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The rural press in its wild scramble for patronage should heed the lesson taught by United States District Judge Beatty of Idaho in an opinion rendered by him in the late case of United States v. Wallis. It was there held that a scheme for increasing the circulation of a newspaper, whereby all paid-up subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a box by a blindfolded person, prizes to be given to the holders of certain tickets is a lottery within the meaning of section 3894 of the United States Revised Statutes notwithstanding that every purchaser of a ticket is repaid its cost by receiving the paper. The statute referred to prohibits any newspaper, circular, pamphlet or publication of any kind offering prizes dependent upon chance to be carried in the mails. The court ruled that the word "lottery" embraces the elements of procuring through lot or chance, by the investment of money or something of value, some greater amount of money or thing of value. Judge Beatty referred to the tendency of the federal courts to construe provisions against lotteries liberally so as to effectuate the substantial remedy imposed, citing Horner v. United States, 147 U. S. 449, which disapproves of Kohn v. Koehler, 96 N. Y. 362, and *Ex parte* Shobert, 70 Cal. 632.

The court might also have been warranted in its declaration of liberal tendencies on the part of federal courts in cases of this kind, by the *ultra* liberal opinion of Judge Grosscup of the Chicago District in the late case of United States v. MacDonald, involving the validity of bond investment schemes. Though the principle announced by Judge Grosscup upon the issue presented may be correct, it is nevertheless true that he was altogether too liberal in his charge to the jury. In striking contrast with the charge in that case is that of United States Judge Miner of the Utah District recently delivered to a jury in the case of United States v. Barton *et al.*, involving a similar question, viz: whether the plan of a bond investment company is a lottery. Judge Miner did not undertake to tell the jury that the plan was a fraud, a cheat or even a lottery. He seemed to take it for granted that a jury was called for some purpose other than the mere registering of the "liberal" views of the court and he very properly and clearly told them what a lottery is and left them to declare whether the scheme in question was within the principle announced.

Another recent and very interesting case upon the subject is McLanahan v. Mott, in the General Term of the New York Supreme Court (25 N. Y. Supp. 892. It was there held that a scheme by which a corporation proposed to issue $100,000,000 of bonds secured on its property, maturing 450 years after date, with interest at 6 per cent. per annum, payable 2 per cent. semi-annually, the remainining 2 per cent. at maturity, with a provision that at each semi-annual payment of interest $400,000 shall be used to redeem to to be designated by the trustee, at their maturity value—that is $1,000 for a $100 bond, is a lottery. Among other things the court said that "there is nothing unlawful in the long term the bonds have to run, although they would be practically irredeemable if all were not to mature until after the expiration of 450 years. But it is perfectly obvious that the redemption feature is the real and only attraction connected with the scheme, and that the inducement offered to purchase the bonds is the chance of holding lucky numbers, and receiving on a determination to be made by lot, $1,000 for $100, possibly in six months or a year, or in one of the earlier semi-annual drawings to be made by the mortgage trustee; or, in other words, that the holder of one bond may, by mere chance get in six months what would not be realized on another in 450 years. That this scheme is a lottery—that to the mere decision of chance is to be left what bonds shall be retired at the enormous increase contemplated—is as plain as if the loudest proclamation were made of it. It is not at all likely that the whole or any considerable part of an issue of one hundred millions of dollars of bonds, in the denomination of one hundred dollars each, bearing interest at 4 or at 6 per cent., and having nearly five centuries to run,

and with no other property or security behind it at the date of issue than a mere mortgage on a franchise, would be marketable without some special inducement to purchasers; and that has been provided here. The redemption feature, which holds out the hope to a purchaser of speedily obtaining ten-fold for his outlay, and as it were, by the turning of a wheel or the casting of lots is the real attraction. It defines the whole plan, stamping it with the character of a lottery, all the real qualities of which it possesses. The element of selecting bonds for redemption is not of itself an objectionable feature. It is the chance of winning at an early drawing ten times the face value of a bond that constitutes illegality, if there is any illegality in the scheme."

NOTES OF RECENT DECISIONS.

MASTER AND SERVANT — FELLOW-SERVANT INDEPENDENT CONTRACTOR.—In Morgan v. Smith, 35 N. E. Rep. 101, the Supreme Judicial Court of Massachusetts laid down some useful rules governing the question of fellow-servant and independent contractor. They decide that though a general servant of one contractor may, by submitting to the directions and control of another, become the servant of the latter, and the fellow-servant of his servants, the evidence must show conclusively that he so submitted himself to the other contractor, and either expressly or impliedly consented to accept him as his master; and where there is evidence that he did not know that he was working other than under the general master's control, it is error to take the question from the jury. Although the servants of different contractors, while engaged in working together on a building, are in common employment, they are not fellow-servants, so long as they are only under the control of their respective masters. The mere fact that one doing work on a building is to be paid a round sum therefor does not make him a servant of the owner, instead of an independent contractor; but he is an independent contractor if he is in the exercise of a distinct and independent employment, using his own means and methods for accomplishing the work, and is not under the immediate supervision and control of the owner. In such case, the mere fact that the architect of the owner directs certain things to be done by the contractor, where he does not exercise any control over him in his manner of doing the work, or his choice of workmen, does not make the contractor a servant of the owner.

GARNISHMENT—EXEMPTION — COMMISSIONS OF TRAVELING SALESMEN.—In Hamberger v. Carr, the Supreme Court of Pennsylvania holds that commissions earned by a traveling salesman, constituting his compensation for services performed by him, are like the wages of any laborer or the salary of any person in public or private employment, not attachable in the hands of an employer under the Pennsylvania statute of 1845; but a factor's or broker's commissions are not wages or salary subject to exemption. Where the garnishee discloses money due to the attachment-defendant for sales commissions, it does not authorize the inference that the commissions were earned as a broker or commission merchant. The proper course, in such case, is to require a more specific answer and to try the question of fact whether the earnings are those of a broker or traveling salesman. The term "broker" in its largest sense, is applied to a specialist who acts as a medium for the negotiation of all kinds of trades and bargains and a commission merchant or factor is an agent for the sale of goods in his possession or consigned to him.

HABEAS CORPUS—CONFLICTING STATE AND FEDERAL JURISDICTION.—The case of Copenhaver v. Stewart, decided by the Supreme Court of Missouri is instructive on the subject of *habeas corpus*. The decision is that in *habeas corpus* proceedings by one imprisoned for contempt in disobeying a writ of *mandamus* whether errors were committed in awarding the writ cannot be determined, as the writ of *habeas corpus* cannot be used as a writ of error. The State courts cannot go behind judgments of Federal Courts where they had jurisdiction of the parties and the subject matter. State courts and the judges thereof have no jurisdiction or power to discharge on *habeas corpus* persons who are held in custody by the authority of the Federal Courts, or the commissioners thereof, or by officers of the United States acting under the laws thereof; and this is true even though

the judgments and orders of the Federal Courts or the commissioners are illegal. Black, J., says:

The three petitioners are the justices of the county court of St. Clair county. They file in this court their petition for a writ of *habeas corpus*, setting out fully and at length the facts and circumstances leading to their confinement, which are to the following effect: In 1870 the county of St. Clair issued $250,000 of bonds under the act of 16th January, 1860, incorporating the Tebo & Neosho Railroad Company, and the act of 21st March, 1868, to aid in the construction of the Clinton & Memphis branch. The Ninth National Bank of the city and State of New York recovered two judgments against the county on some of the bonds and coupons, in the Circuit Court of the United States. Such proceedings were had on these judgments that the Circuit Court of the United States for the western division of the western district of this State issued a peremptory writ of *mandamus* in each case, commanding the petitioners, as justices of the county court, "to levy at the time of making the next annual levy, and cause to be collected, upon all the real and personal property in said county subject to taxation, a tax for the payment of said judgment, . . . and to pay the same according to law, and that you have said special taxes extended in a column of the regular tax book in the same manner," etc. The writs were issued on the 25th April, and duly served on the 1st May, 1893. Such other proceedings were had that on the 10th May, 1893, the court entered the following judgment in each case: That the respondents, the petitioners here, "are guilty of contempt in disobeying as well as continuing to disobey the said peremptory writ of *mandamus* and the order and command therein, and for such contempt each of said respondents is here and now sentenced by this court to imprisonment in the county jail of the county of Jackson. . . until such time as they shall comply with such mandate and order of this court, or until otherwise discharged therefrom by the order of this court, or otherwise pursuant to law." Pursuant to these judgments, commitments were issued, by virtue of which the petitioners were and now are confined in the jail of Jackson county, and from which imprisonment they seek to be discharged by the writ of *habeas corpus*. We have not set out the various averments made in the petition for the purpose of showing that the bonds were issued without authority of law, and should have been held illegal and void, because the question as to the validity of the bonds is not an open one. The Circuit Court of the United States had undoubted jurisdiction of the parties to and the subject-matter of these suits, and the judgments are final and conclusive. We have no right or power to go behind the judgments, and for all the purposes of this application it must be assumed that the bonds were and are valid obligations of the county.

Counsel for the petitioners insist in an elaborate brief, and earnestly insisted on the argument of this cause, that the petitioners are illegally imprisoned for various reasons. Some of the reasons assigned show, and only show, that the Circuit Court of the United States committed error in awarding the peremptory writ of *mandamus*. Such reasons would not justify any court in releasing the petitioners on *habeas corpus*, for that writ cannot be used as a mere writ of error. This is well-settled law. Others of the reasons assigned for the discharge of the petitioners strike much deeper. Thus it is insisted that the commitments are utterly void, because they are based upon a refusal to obey peremptory writs of *mandamus*, which writs of *mandamus* are void, because they command the petitioners to cause the taxes to be collected, when the petitioners, as justices of the county court, have nothing whatever to do with the collection of taxes; that duty being devolved upon the collector, who is a bonded officer, acting under the law, and not under the orders of the county court. And in support of these propositions counsel cite *Ex parte* Rowland, 104 U. S. 604. These and other propositions will be entitled to a full consideration at the hands of this court, if we have the power to go into them. But behind all of them is the question whether this court has any jurisdiction whatever to discharge the petitioners, they having been committed to jail for contempt by the judgment of a Federal Court; and this presents the first question for our consideration. The facts in the cases of Ableman v. Booth and U. S. v. Booth, 21 How. 506, are, in short, to the following effect: In one case Booth had been arrested on warrants issued by a United States commissioner. A judge of the Supreme Court of Wisconsin discharged Booth on *habeas corpus*, on the ground that the law was unconstitutional for a violation of which the arrest had been made. In the other case Booth was subsequently arrested and convicted in a Federal Court for the same offense, and the State Court again discharged him on *habeas corpus*. Both cases were taken to the Supreme Court of the United States for review. The Court said: "There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power by *habeas corpus* or otherwise, within the jurisdiction of another independent government. . . . And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned." And further on it is again said: "We do not question the authority of a State Court or judge who is authorized by the laws of the State to issue the writ of *habeas corpus* to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. . . But after the return is made, and the State judge or court judicially appraised that the party is in custody under the authority of the United States, they can proceed no further." The principles asserted in these cases were affirmed in Tarble's Case, 13 Wall. 397. There the specific question was whether a State Court commissioner had jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of a soldier into the military service of the United States. The court stated the question to be decided in much broader terms; that is to say: "Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of authority, of the United States, by an officer of the government." It was held that State judicial officer have no such jurisdiction, and hence the State Cours

commissioner was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner, he being held under claim and color of the authority of the United States.

In answer to the claim made in the case now in hand that the commitments are void, because the writs of *mandamus* command the petitioners to do that which they have no power to do, namely, cause the taxes levied by them to be collected, we make the following quotation from the case last mentioned: "Some attempt has been made in adjudications to which our attention has been called to limit the decision of this court in Ableman v. Booth and U. S. v. Booth to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority; but it is evident that the decision does not admit of any such limitation." A State Court or judge, it is held, should not proceed, if the prisoner is held under what purports to be the authority of the United States; that is to say, "an authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant his release." In Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. Rep. 544, it was held that an agent appointed by a State in which a fugitive stands charged with a crime to receive the fugitive from the State surrendering him is not an officer of the United States within the meaning of the cases before cited; and it was further ruled in that case that, while the Federal Courts have the exclusive authority to determine whether persons are held in conformity with law who are held in custody by authority of the national courts, or the commissioners thereof, or by officers of the United States, yet the States have the right by their courts and judges in all other cases to inquire into the grounds upon which any person is restrained of his liberty, and to discharge him if illegally restrained; and this, too, although such illegality may arise from a violation of the constitution and laws of the United States.

From the foregoing authorities it must be taken as now well-established law that State courts and the judges thereof have no jurisdiction or power to discharge persons who are held in custody by authority of the Federal Courts, or by the authority of the commissioners of such courts, or by officers of the United States acting under the laws thereof; and this is true though the judgments or orders of the Federal Courts or commissioners are illegal. The remedy in all such cases is in the courts of the United States. Adherence to these rules is absolutely necessary to prevent conflict of jurisdiction, and to maintain and uphold the stability of both the national and State governments. On the other hand, State governments and the judges thereof have all the exclusive jurisdiction of independent governments, except so far as the States have granted judicial powers to the general government. Out of this exception arises the doctrine that the Federal Courts and judges may by *habeas corpus* release persons restrained of their liberty in violation of the constitution and laws of the United States, though such persons are restrained under the criminal process of the State. This inequality is due to the fact that the constitution and laws of the United States are the supreme laws of the land.

It appears on the face of the petition in this case that the petitioners are imprisoned by virtue of the orders or judgments of a court of the United States, and it follows from what has been said that this court has no power, on the conceded facts, to discharge them; and this is true though this court should be of the opinion that the judgments of the Circuit Court of the United States are in excess of its rightful powers. It is therefore out of place here to go into the question whether the orders of commitment are in any respect in excess of the jurisdiction of that court. That is a question which must be determined by the national courts themselves.

PREFERENCE BY INSOLVENT CORPORATORS.

Can an insolvent corporation prefer one of its creditors to another? The answer to this question involves the consideration of a number of factors. In the first place what is meant by an "insolvent corporation?" Does it mean an incorporation called upon to at once meet its obligations, pay all its debts? Then if it does there are few solvent corporations—especially trading or manufacturing corporations. Does it mean a corporation that is not able to pay its debts or obligations in the due course of business? Or does it mean a corporation that has ceased to be "a going concern," as the phrase runs, a corporation that is no longer, by reason of its financial embarrassments, able to transact the business for which it was created, to pursue its corporate duties, and nothing remains but to apply its assets to the cancellation of its indebtedness, and to "wind it up." Then other considerations arise. At the time of the preference must the corporate officers, those who direct, control and in its general outlines manage the business of the corporation—have knowledge or be cognizant of its condition? And must the preferred creditor also have a like knowledge, or such information that he is chargeable with notice? Still farther, is it sufficient that the creditor alone, have such knowledge or the corporate officer alone have it? And a still farther consideration is essential to a full and clear understanding of the question: Must the debt secured, to render the preference void, be a past indebtedness? Or an indebtedness secured at the time it is created, in reliance upon the preference? And in the latter instance must the creditor be ignorant of the financial condition of the corporation? Of course in this discussion we have no reference to a creditor who is a director, an officer or even a stockholder of the corporation but simply to a person who bears no other relation to the corporation than

that of a debtor and creditor. Upon the right of an insolvent corporation to prefer one creditor to another, the case of Catlin v. The Eagle Bank of New Haven, decided in 1826, is a leading case.[1] The bank having become insolvent, assigned to one of its customers $52,000 of notes, gave him a mortgage on real estate for $20,000, and paid him $15,000 in money. The amount of the deposit thus secured was $80,000 or $90,000. It does not appear whether the bank had ceased to be "a going concern," but only that it was actually insolvent when the preference was made. The charter of that bank is not accessible to the writer, but Chief Justice Hosmar in rendering the opinion of the court stated that it "had authority to purchase, hold and convey property, with the usual banking powers super-added; and the directors were authorized to dispose of and manage its moneys, credits and property, and to regulate its concerns, in all cases not specially provided for."

"To this general grant" continued the court, "in relations to the rights, privileges and duration of the bank, there is neither exception nor limitation, save that the charter is alterable, amendable and revocable, at the pleasure of the legislature." The question before the court was said to be as follows: "Whether the directors of the corporation, after it has become actually insolvent, can make payment or give security to one of its creditors, and leave another unpaid and without security, is the general question to be determined." And the court answered the question in the affirmative. "It has been contended," said the court, "in behalf of the plaintiff, with no considerable ingenuity, that the legislature intended to render the corporation at all times a trustee for the creditors. This suggestion is too unfounded, and too destitute of practical importance, to be admitted or discussed. Such a principle, during the solvency of the bank, must be dormant and useless; and neither the charter, nor the nature of the case, furnished any warrant for the supposition." "If the corporation, so far as regards its right to manage and dispose of the property," continued the court, "has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. * * * It is difficult for me to conceive, where no restraint is interposed, in a charter of incorporation, on what ground, the general authority delegated is subjected to exceptions, or fettered by restrictions, from which an individual and a mercantile company, are free. * * * The cases of an individual and a corporation, in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason, for the slightest difference between them." To this suggestion that on the insolvency of the bank it became the trustees of its creditors, and the latter the *cestui que trust* of all its corporate property, the court entered a denial, saying that the charter did not create any such trust nor did any arise by operation of law. "The insolvent banking corporation is just as much a trustee of the creditors," said the court, "and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trusts arise. * * * It would be a very hard and in equitable doctrine, but on the plaintiff's claim it is inevitable, that the moment a banking institution is unable to pay its debts, the directors of the bank may not issue a bank bill, dispose of the bank property, make payment of a single debt, or perform one bank operation. May not an individual or mercantile company, under the same circumstances, proceed in the usual train of business? This is not disputed. It is the law of chancery that they may prefer one creditor to another; and this, on a principle of analogy, refutes entirely, the supposition of a trust in this case. The novelty and unsoundness of the plaintiff's claim are such, that it is difficult to support, or even oppose it, without taking leave of every established principle, and beating the air. That the directors of the Eagle Bank are trustees, I admit; but they are the trustees of the stockholders. The stockholders are the *cestui que trusts*, and the charge of breach of trust must come from them." This case was followed in Connecticut by other cases, both in principle and as a binding authority in like instances.[2]

It is to be observed of the argument of the court that it proceeds upon the ground that any insolvent corporation may not prefer a

[1] 6 Conn. 233.

[2] Savings Bank v. Bates, 8 Conn. 505; Providence Company v. Clark, 25 Conn. 97; Crandall v. Lincoln, 52 Conn. 73, 108; Smith v. Skeary, 47 Conn. 47.

creditor; and no distinction is noticed as to the difference between a corporation merely insolvent and one that has become so insolvent that it can no longer transact business, or that the directors or officers in authority, by reason of its insolvency, have decided to wind it up and dissolve it. The court does not seem to have grasped this distinction; but it is haunted with the fear that if it adopt the rule that an insolvent corporation may not prefer a creditor then great inconvenience will arise in trading with corporations, and they will be greatly impaired in their usefulness. Nor does the court allude to the difference of securing a past creditor and one advancing money or property to an insolvent corporation and who stipulates, at the time of the advancement, for security. Another leading case is Buell v. Buckingham,[3] decided in 1864. The corporation owed one Buell over $7,500 for money previously advanced by him, and in consideration of the conveyance to him of five or six thousand dollars worth of property, he agreed to pay debts of the corporation amounting to nearly $2,000 and apply the remainder on his claim. The corporation also owed him $2,000 of stock which they had promised but never issued to him. The court held that the corporation might thus prefer him. But it is to be observed, in the language of Judge Cole, that "there is no evidence in the case, that the corporation was insolvent, or that the sale to Buell embraced all its property." "But," said Judge Cole, "if such facts were shown, since the transaction was an absolute sale in good faith for a valuable consideration, and not a mortgage, or pledge, or assignment, with any contingent interest remaining in the grantor, it cannot, under the decisions of this court, be held to be a general assignment, and, therefore void." Judge Dillon reached the conclusion that the corporation could assign all its property to secure a creditor, just as an individual may.[4] In Sargent v. Webster,[5] the corporation was actually insolvent. That fact was so found by the board of directors at a regular meeting, and they authorized the proper officers to convey all the property of the corporation to an indorser of the corporation, who was authorized to sell the property, apply enough of the proceeds to the payment of his own liability and pay the remainder to the treasurer of the corporation. The conveyance was held valid, the court remarking that it did not "appear that the proceeds was not in furtherance of the purposes of incorporation." "It was a trading corporation," said the court; "and one of their purposes was to pay their debts, to enable them either to go on successfully again by the aid of new assessments, or to wind up and settle, upon terms most advantageous to the stockholders."[6] In Michigan a banking corporation had suspended payment, and after its suspension the board of directors executed a deed to trustees, assigning all the corporate property for the payment of the debts of the bank, preferring particular creditors. This was held a valid preference.[7] The case of the State v. Bank of Maryland,[8] is often referred to as an authority allowing an insolvent corporation to prefer its creditors; but that was a transfer to a trustee to pay all its creditors, although the court, in a broad dictum, says an insolvent corporation may, just as an individual, prefer one or more of its creditors.[9] In Planter's Bank v. Whittle,[10] suit had been begun against a going corporation for the appointment of a receiver on the ground of its insolvency. In fact it was insolvent. After the commencement of the suit the corporation assigned certain bonds to secure past indebtedness due a single creditor; and the preference was upheld. The court denied that the directors were technically trustees for the creditors, and were bound to apply the assets ratably among the general creditors of the concern. The case of Sawyer v. Hoag,[11] was relied upon by counsel contending that the property was held by the directors or trustees of the creditors. "In that case," said the court, "the well established principle was asserted that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general

[3] 16 Iowa, 284.

[4] Garrett v. Burlington, etc. Co., 70 Ia. 697, 59 Am. Rep. 46; Warfield, etc. Co. v. Marshall, etc. Co., 72 Ala. 666; Rollins v. Shover, etc. Co., 80 Ia. 380.

[5] 13 Met. 497.

[6] The case is thus summarily disposed of on this point.

[7] Town v. Bank, 2 Doug. 530.

[8] 6 Gill & J. 205, 26 Am. Dec. 561.

[9] The case of the Union Bank v. Ellicott, 6 Gill & J. 363, is likewise referred to on this head, but it was a general assignment.

[10] 78 Va. 737; Am. & Eng. Corp. Cas. 298.

[11] 17 Wall. 610.

creditors, which cannot be withdrawn from their reach by any act or device on the part of the directors. But no such doctrine as is here contended for was there laid down. On the contrary, the court recognized a distinction between the capital stock of a corporation and its ordinary assets with which it was said, the directors may deal as they choose." Other cases are cited in the note below, showing a strong array of authority, both federal and State.[12] Some of these cases are direct adjudications on the question, in some of them the decision was put on other grounds, while in still others there are only a *dicta* or allusions made to the rule allowing preferences. But there is a very strong dissent from these cases; and of these dissenting cases it is to be observed that they are quite modern, prevail only in this country, and have been decided since the evil effects of such preferences have been fully felt and understood. In the case of Rouse v. Merchant's National Bank,[13] it was decided "that when a corporation for profit, organized under the laws of this [Ohio] State, becomes solvent and ceases to carry on its business or further pursue the purpose of its creation, constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf, over the other creditors, or over an assignment thereafter made for the benefit of creditors." The court starts with the well settled proposition that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of insolvency, as decided by Mr. Justice Story in Wood v. Dummer.[14] "It appears to me very clear," says Justice Story, "upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charter of our banks make the capital stock a trust fund for the payment of all the debts of the

[12] Bank of Montreal v. Potts, etc. Co., 90 Mich. 345, 38 Am. & Eng. Corp. Cas. 60; Reichwald v. Commercial Hotel Co., 106 Ill. 439, 5 Am. & Eng. Corp. Cas. 248; Ragland v. McFall, 137 Ill. 81, 27 N. E. Rep. 75; Union Bank v. Ellicott, 6 Gill & J. 363; Burr v. McDonald, 3 Gratt. 215; Whitnell v. Warner, 20 Vt. 425; Warner v. Mower, 11 Vt. 390; Ringo v. Biscoe, 13 Ark. 563; *Ex parte* v. Conway, 4 Ark. 302; Dobney v. Bank, 3 S. C. 124, 19 Wall. 1; Railroad Co. v. Clenghorn, 1 Speer Eq. 562; Bank of U. S. v. Huth, 4 B. Mon. 423; Reinhard v. Bank of Kentucky, 6 B. Mon. 252; Bank of Conner v. Payne, 86 Ky. 446; Lippincott v. Slow, etc. Co., 25 Fed. Rep. 577; Hills v. Stockwell, 23 Fed. Rep. 432; Adams v. Kehlor Mining Co., 35 Fed. Rep. 433; Allis v. Jones, 45 Fed. Rep. 148; Hoyt v. Sheldon, 3 Bosw. 267; Jones v. Bank, 10 Colo. 464. In New York a statute now prohibits an insolvent corporation giving preferences but it does not apply to foreign corporations, and preferences by these are maintained. Coats v. Donnell, 94 N. Y. 168. In West Virginia the court holds a preference by an insolvent corporation to be valid; but upon the sole ground that such a rule was the law of the State, by reason of the decisions in Virginia before the States were separated, a law by which the courts of West Virginia is bound. In fact all the leaning of the Supreme Court is to hold, on principle, such a preference invalid. Plyes v. Furniture Co., 30 W. Va. 123, 17 Am. & Eng. Corp. Cas. 102, 2 S. E. Rep. 909; Lamb v. Laughlin, 28 W. Va. 300; Lamb v. Rannell, 28 W. Va. 663. In Minnesota the doctrine of the so called "trust fund," hereafter discussed, is emphatically denied. Hospes v. Northwestern Mf. Co., 48 Minn. 174, 50 N. W. Rep. 1117. For other cases see Vail v. Jameson, 41 N. J. Equity, 648; Bergen v. Porpoise, etc. Co., 42 N. J. Eq. 397; Kranse v. Malaga Glass Co., 18 Atl. Rep. 367; Dana v. Bank of U. S., 5 W. S. 223; Ahl v. Rhoads, 84 Penn. 319; U. S. Bank, 8 Rob. La. 362, a decision on Pennsylvania law; Arthur v. President, etc. Co., 9 S. M. Miss. 394, reversing S. & M. (Miss.) Ch. 207.

[13] 46 Ohio St. 493, 22 N. E. Rep. 293; 29 Am. & Eng. Corp. Cas. 417; 15 Amer. St. Rep. 644; 5 Law Ann. Rep. 378.

[14] 3 Mason, 309.

corporation. The bill holders and other creditors have the first claims upon it; and the stockholders have no rights, until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment; and cannot take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the *residuum.*"[15] "The capital stock," says Mr. Justice Swayne, "of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liabilities which subsist in private copartnerships. When debts are incurred, a contest arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security."[16] In an earlier case Mr. Justice Curtis said: "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of its creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied."[17] "The capital stock of a moneyed corporation," said Mr. Justice Hunt, "is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its stockholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts."[18] Upon the doctrine laid down in these quotations there are numerous authorities supporting it.[19]

[15] Wood v. Dummer, 3 Mason, 309.

[16] Sanger v. Upton, 91 U. S. 56.

[17] Curran v. Arkansas, 15 Hon. 312.

[18] Upton v. Tribilock, 91 U. S. 45.

[19] Taylor v. Miama Exporting Co., 5 Ohio, 165, 22 Amer. Dec. 785; Goodwin v. Cincinnati, etc. Co., 18 Ohio St. 182, 98 Amer. Dec. 95; Haywood v. Lincoln, etc. Co., 64 Wis. 639; Marr v. Bank of West Tennessee, 4 Coldw. 471. Shea v. Mabry, 1 Lea, 319; Jones v. Arkansas, etc. Co., 38 Ark. 17; Olney v. Conanicut Land Co., 16 R. I. 597, 28 Amer. & Eng. Corp. Cas. 485; Gas Light Improvement Co. v. Terrell, L. R. 10 Equity, 168. *In re* Iron Clay Brick Mf. Co., 19 Ontario, 113, 33 Amer. & Eng. Corp. Cas. 277.

In the case of Rouse v. Merchant's National Bank, *supra*, the court then proceeds to say that "it being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows that after the insolvency of the corporation as ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property become trustees thereof for the creditors; and this relation necessarily forbids any discrimination between the beneficiaries in the distribution or application of the fund. The due execution of the fund demands absolute impartiality toward the *cestui que trustent.* They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear that if the corporate property constitutes a fund for the creditors, it is as much so for one creditor, as for another, and that the directors in possession are without authority to dispose of it, in disregard of the rights of any creditor. They can no more discriminate between creditors in such case than they could before the insolvency of the corporation between the shareholders. The objects for which the corporation was created being no longer prosecuted, and the occasion for the exercise by the board of directors of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity, the corporate property becomes the property of the creditors, and their equties are equal. Every creditor, who became such by parting with his money, property, or other thing of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate funds; and when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors becomes fixed instantly and equally, for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor. * * * It would seem to result as a necessary consequence that insolvent corporations which have ceased to carry on business cannot, by pledge or

mortgage of the corporate property to some of the creditors, in payment or security of antecedent debts, without other consideration, create valid preferences in their favor over others; and this is the view maintained by the more recent writers on the subject." The fact that the stockholders were individually liable to the amount of their debts was regarded as an argument in favor rather than against the claim that there could be no preference; for the corporate property being the primary fund, and the statutory liability of the stockholder being a security to be resorted to only when the payment of its debts could not be enforced against its property; and a stockholder, who has assigned his stock to an insolvent assignee is liable only for such portion of the debt existing while he was such stockholder as is equal to the proportion which his stock bears to the stock held by all the stockholders liable for the same debt; then, if the directors could prefer certain creditors of the corporation, they could prefer just such as they were liable to personally and thus wholly escape a personal liability while stockholders liable for other debts must pay them in full without aid from the corporate property, which may have been exhausted. In the case of Rouse the directors placed a chattel mortgage on its property, to secure one of its creditors, after they knew the corporation was insolvent and would be compelled to make an assignment. The mortgage was held void, because it was an undue preference over other creditors, a thing directors had no power to make.[20] A similar decision has been made in Tennessee. "By the insolvency of the bank," said the court, "the corporation was rendered incapable of pursuing the objects for which it was created, without defrauding the public and its existing creditors. Its officers, or agents, properly ceased to use its franchise after the insolvency was ascertained; but their responsibility as to the assets did not cease. They continued to hold them as before—not for themselves, or for the use and benefit of the stockholders; but for the creditors of the corporation. While the bank was solvent, and in the full use and enjoyment of all franchises, the entire beneficial interest in its funds and assets, belonged to the stockholders; as the court will, in the language of a chief justice, for legitimate purposes, look through the technical definition of the corporation, as a mere legal existence, and contemplate it more substantially in the person's interests it represents. But, after the insolvency of the corporation, all the legal ownership of the assets may continue as before—the beneficial interest of the stockholders clearly no longer exists. A state of insolvency presupposes that the capital stock and assets are insufficient to meet its liabilities. The stockholders, having incurred no personal liability for the debts of the corporation, have, in point of fact, no interest in the disposition of the assets of the bank, after its insolvency. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which with the after-acquired property or assets of the corporation, they can alone look for indemnity. Both stand pledged for the payment of the corporation debts, and a court of equity will follow them into the hands of stockholders, or other persons receiving them with notice, for the benefit of creditors. From this view of the case, it seems to follow as a necessary consequence, after the admitted insolvency of the bank, and the non-use of its franchise, that the officers or agents of the corporation, in whose hands the assets remain, held them as *quasi*-trustees for the creditors, and, as such, may depend the right and title thereto of all the creditors, or *cestui que trusts*. Otherwise, they would, after payment to a single creditor, as in this case, of all the assets, be without remedy."[21]

In Shea v. Mabry, *supra*, it is said that if a creditor of the corporation, after its insolvency, secure an attachment lien upon the property of the corporation, the other creditors may come in and compel him to share the proceeds thus secured with them, upon the grounds of equity. In Leipold v. Marony,[22] it was held that the assets of a foreign corporation, doing business in Ten-

[20] This case was followed in Smith Middlings Purifier Co. v. McGroarty, 136 U. S. 237, because it was the law of Ohio and it was passing on an Ohio controversy.

[21] Marr v. Bank of West Tennessee, 4 Coldw. 471. The doctrine of this case has been recognized in subsequent decisions of this court, though only *in dicta*. Baxter v. Nashville, etc. Co., 10 Lea, 488; Smith v. St. Louis, etc. Co., 6 Lea, 564. Comfort v. Patterson, 2 Lea, 564; Comfort v. Patterson, 2 Lea, 670; Shea v. Mabry, 1 Lea, 319, 345; Moseby v. Williamson, 5 Heisk, 278.

[22] 7 Lea, 128.

nessee, became, from the date of its insolvency, a trust fund for the benefit of creditors, and the chancery court acquiring jurisdiction may administer the assets, and enjoin separate creditors from prosecuting independent suits against the trust property, on the ground that the court of chancery will seize the assets and distribute them *pro rata* among the creditors[23] In the case of White, etc. Co. v. Pettes,[24] is a suggestion that after a corporation has ceased to be a "going concern," that is to say, has ceased to transact its ordinary business, the directors cannot thereafter prefer creditors of the corporation; but the corporation, says the court, must be confessedly insolvent and unable to extricate itself from its financial difficulties. In Williams v. Jones,[25] it was said by Phillips, J., "It may be further conceded that for civil purposes, corporations are deemed persons, and may make an assignment for the benefit of creditors, pursuant to statutory regulations. Nor do we propose by anything said in this discussion, to deny the right of an embarrassed corporation, in good faith, to prefer one creditor to another as the result of securities given him under proper circumstances. It will be found, generally, that when courts have spoken thus, it is in respect of what is sometimes termed "a going concern;" a corporation doing business, though crippled and embarrassed, yet has vitality and hope in it. But after a careful review of the multitude of authorities bearing on this question, and looking to the reason and justice of the matter, I am unable to recognize the right or policy of directors, after they have voted their concern to be insolvent, and determined to wind up its affairs with a view to the payment of its debts, to turn over its assets to one of its number in payment of his debt, to the exclusion of the other creditors of equal right." Judge Phillips then proceeds to discuss the proposition that an insolvent corporation may prefer one creditor to another, and dissents from the view thus taken by some of the courts, and approves Morawetz on Corporations, § 582.[26] In the case of Damarin v. Huron Iron Co.,[27] it was held that a mortgage executed by a corporation to secure a pre-existing debt, is not, necessarily, invalid for the reason that the company was known to be insolvent, where the company is at the time, in the possession of its property and in the active prosecution of its business, and intends to continue therein, unless prevented by other creditors, and the object of the mortgage, is, on its part, not to give a preference to one creditor over another, but simply to obtain an extension of credit. In Haywood v. Lincoln Lumber Co.,[28] the rule that a mortgage of an insolvent corporation preferring one of its creditors is void, was recognized; and in First National Bank v. Knowles[29] the same rule was adopted and applied. "When the trust deed was made," said the court, "the corporation being grossly insolvent, its directors and officers in equity held the entire assets and resources of the corporation in trust, not for the stockholders, but for its creditors; and equity requires that they should be exclusively devoted to the payment of all its creditors alike and *pro rata*. In such a case equity is equality, and sanctions no preferences and is no respector of persons." In Hightower v. Mustion,[30] it is held that an assignment of assets of a bank, insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter, made to a creditor cognizant of these things, and by collusion with him to defraud the other creditors, is void; and that the assets so assigned to him is a trust fund, to be applied to the payment of the debts of the corporation. In Corey v. Wadsworth,[31] in speaking of the incapacity of a director of an insolvent corporation to prefer himself, the court takes occasion to define an insolvent corporation as there contemplated. "At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principle we have declared? It is not enough that its assets are insufficient to meet all its liabilities if it be still prosecuting

[23] Smith v. St. Louis, etc. Co., 3 Tenn. Ch. 502; Smith v. St. Louis, etc. Co., 2 Tenn. Ch. 727.

[24] 30 Fed. Rep. 864.

[25] 23 Mo. App. 132.

[26] The same view was taken in Roan v. Winn, 93 Mo. 503, by the Supreme Court of Missouri, though that was a case of preference of a director, and in Kankakee, etc. Co. v. Kempe, 38 Mo. App. 229; and State v. Brockmen, 39 Mo. App. 136.

[27] 47 Ohio St. 581, 26 N. E. Rep. 47.

[28] 64 Wis. 639, 26 N. W. Rep. 184.

[29] 67 Wis. 373, 28 N. W. Rep. 225.

[30] 8 Geo. 506.

[31] 11 South. Rep. 350, 38 Amer. & Eng. Corp. Cas. 164.

its line of business, with the prospect and expectation of continuing to do so; in other words, if it be in good faith, what is sometimes called a "going" business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarressments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent." In Smith v. Putnam, [32] in speaking of inability of directors of an insolvent corporation to prefer themselves, the Supreme Court of New Hampshire said: "As soon as the corporation becomes insolvent, its property became a fund belonging equally in equity to all the creditors."

In Thompson v. Huron Lumber Co.,[33] a mortgage placed by a corporation on all its property after it becomes insolvent, was held void, because it was an undue preference of one creditor over another which the corporation had no power to make.[34]

[32] 61 N. H. 632.

[33] 30 Pac. Rep. 741.

[34] The leading case holding that an insolvent corporation, even after knowledge of its insolvency, may prefer one creditor to another is Catlin v. Eagle Bank, 6 Conn. 233. In this case the insolvency of a corporation is treated precisely as the insolvency of an individual, a view which is repudiated in Rouse v. Merchants' National Bank, *supra*. The same rule was adopted in Savings Bank v. Bates, 505, and in Pondville Company v. Clark, 25 Conn. 97. In Crandall v. Lincoln, 52 Conn. 73, 108, Catlin's case is distinguished, and a manifest learning is apparent to hold the directors trustees, in a very strong sense, of the assets of the corporation, even in favor of creditors. In Wilkinson v. Bauerle, 41 N. J. Eq. 635, an insolvent corporation was held empowered to prefer a creditor; and this case was followed in Vail v. Jameson, 41 N. J. Eq. 648, and this rule is recognized in Berger v. Porpoise, etc. Co., 42 N. J. Eq. 397, and in Smith v. Skeary, 47 Conn. 47. The doctrine, however, is somewhat limited in Krause v. Molaga Glass Co., 18 Atl. Rep. 367, where it was held that a creditor of a company having $15,000 worth of assets and owing $160,000 and confessing judgment to one who owned the greater part of its stock, and knew the condition of its affairs, and not advancing money to the company at the time of such judgment, would be restrained in the enforcement of his judgment. In Sargent v. Webster, 13 Met. 497, an assignment of all its property by an insolvent corporation to one of its creditors for the purpose of enabling him to secure himself first, in full, and then pay the remaining creditors as far as the assets would apply, was held valid, though the question received scant consideration in the opinion. That an insolvent corporation may prefer a creditor, was held in Dana v. Bank of U. S. 5 W. & S. 223, and in Ahl v. Rhoads, 84 Penn. 319; U. S. v. Bank, 8 Rob Lea, 262, a Pennsylvania decision. The same was held in Arthur v. President, etc. Co., 9 S. & M. (Miss.) 394. The case reverses S. & M. Ch. 207, holding a different rule. The same rule was adopted in an early Michigan case. Town v. Bank, 2 Doug. 530; Bank of Montreal v. Patts, etc. Co., 90 Mich. 345, 38 Amer. & Eng. Corp. Cas. 60; and in Iowa in Buell v. Buckingham, 16 Iowa, 284; Garrett v. Burlington Plow Co., 70 Ia. 697, 59 Amer. Rep. 461; Warfield, etc. Co. v. Marshall, etc. Co., 72 Ia. 666; Rollins v. Shover, etc. Co., 80 Ia. 380; and in Illinois, Reichwald v. Commercial Hotel Co., 106 Ill. 439, 5 Amer. & Eng. Corp. Cas. 248; Ragland v. McFall, 137 Ill. 81, 27 N. E. Rep. 75; and in Maryland, State v. Bank, 6 Gill & J. 205, 25 Amer. Dec. 561; Union Bank v. Ellicott, 6 Gill & J. 363; and in Virginia, Planter's Bank of Farmville v. Whittle, 78 Va. 737, 6 Amer. & Eng. Corp. Cas. 298; Burr v. McDonald, 3 Gratt, 215; and in Vermont, Whitwell v. Warner, 20 Vt. 425; Warner v. Mower, 11 Vt. 390; and in Arkansas Ringo v. Biscoe, 13 Ark. 563; *Ex parte* Conway, 4 Ark. 302, and in South Carolina Dabney v. Bank, 3 S. C. 124, 10 Wall. 1; Railroad Co. v. Clanghorn, 1 Speer Eq. 562; in Kentucky, though the question is not discussed, Bank of U. S. v. Huth, 4 B. Mon. 423; Reinhard v. Bank of Kentucky, 6 B. Mon. 252; Bank of Commerce v. Payne, 86 Ky. 446. In West Virginia the same rule is adopted, though under protest, because such was the law of Virginia when West Virginia was part of that State, and thus the Virginia decisions became a part of the law of West Virginia unalterable except by an act of the legislature. Pyles v. Furniture Co., 30 W. Va. 123, 7 Amer. & Eng. Corp. Cas. 102; 2 S. E. Rep. 909. Lamb v. Laughlin, 25 Va. 663, however, is as strong a statement of the rule that an insolvent corporation can give one of its creditors no preference as can be found. Some of the U. S. Circuit Courts have adopted a rule allowing preferences to be made by an insolvent corporation. Gould v. Little Rock, etc. Ry. Co., 52 Fed. Rep. 680; Lippincott v. Shaw, etc. Co., 25 Fed. Rep. 577; Hills v. Stockwell, 23 Fed. Rep. 432; Adams v. Kehlor Mining Co., 35 Fed. Rep. 433. Perhaps, however, this case does not lean that way. Allis v. Jones, 45 Fed. Rep. 148. In Hosper v. Northwestern Mf. Co., 48 Minn. 174, 50 N. W. Rep. 1117, the entire doctrine of the so called "trust fund," is denied. The same ruled prevailed in New York before the passage of a statute annulling it. Hoyt v. Sheldon, 3 Bosw. 267. This statute does not apply to a foreign corporation, and consequently such a corporation may be preferred in that State. Coats v. Donnell, 94 N. Y. 168. In this latter case, however, it does not appear that the corporation had decided to wind itself up, and go out of business. A section of the bankrupt law prohibited a national bank preferring its creditors by a pledge of the bankrupt's property "made after the commission of an act of insolvency, or in contemplation thereof, with a view to pre-

In view of this conflict of authority of judicial opinions, it seems folly for an author to give his opinion concerning the question

under discussion; but we may be permitted to observe that modern cases tend to uphold the theory that an insolvent corporation, known to be insolvent at the time, cannot prefer one creditor to the damage of another; that good faith requires, when a corporation is in such a condition, that all the creditors be treated alike, and that corporate assets may be treated as a fund for the payment of the corporation's debts, and that each and every creditor has an interest in that fund. There is a clear distinction between an insolvent individual or partnership and an insolvent corporation. An insolvent corporation usually does, and nearly always must necessarily, come to an end when the question of insolvency is determined; but an individual or even a partnership may live for years and be able to accumulate property and funds whereby he may cancel or satisfy his past indebtedness. With a corporation, however, that comes to an end. It is very different, for it is dissolved in the air, and it is utterly impossible for it to accumulate property to pay its past indebtedness. It must strike every one that the rule requiring an equal division of the assets of a corporation among its creditors, is one that is eminently just and fair, which does equity among all those interested, and which is the true outgrowth of the principles of modern equity so forcibly put by Mr. Justice Jessel in discussing cases that have come before him in recent years; and to whom writers upon equitable questions are constantly referring in discussing the principles of modern equity. The old rule is one of grab, one of greed; the new rule one of justice, one of fairness. When the old rule was enforced, men had not learned to what base conditions corporations may be put and how they may become the instruments of fraud. As human knowledge progresses and new ways of perpetrating frauds are ascertained, opened, and practiced, the courts must keep pace with them and check and prevent the evil that must necessarily arise in following these corrupt practices. And if they do not do so, they will fail in the object for which they were created, to administer justice.

W. W. THORNTON.

Indianapolis, Ind.

vent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes;" but it was held that this did not prevent such a bank, being embarrassed and in need of assistance, to receive a loan of money from a person, who knew its embarrassed state, on condition that he be secured therefor, and that such a security was not giving him a preference over other creditors within the meaning of the statute. Casey v. La Societe, 2 Woods, 77. In Colorado an insolvent corporation may prefer a creditor. Jones v. Bank, 10 Colo. 464.

EQUITY — ADEQUATE REMEDY AT LAW — LACHES.

EIFFERT V. CRAPS.

United States Circuit Court of Appeals, Fourth Circuit, Dec. 1893.

A bill to recover land alleging that it belonged to complainant's father and was sold under a decree of court without jurisdiction of the subject matter or of complainants, is not maintainable in equity as it shows that the legal title is still in plaintiffs and may therefore be enforced by action in ejectment.

One who relies for the recovery of lands on a fraud 40 years old must be held guilty of laches, when it appears that the fraud might have been discovered at any time after its perpetration by the inspection of a single deed, recorded where the record of title of the land was to be looked for, and that the original purchaser under the deed has been dead 12 years, and the land devised by his will sold in partition, and resold several times.

MORRIS, DISTRICT JUDGE: The complainants, alleging themselves to be children and heirs of John H. Eiffert, on April 9, 1890, filed their bill of complaint, in equity, to set aside a deed charged to be fraudulent, and to recover possession of about 90 acres of land in Lexington district, in South Carolina. They allege that their father John H. Eiffert, being in possession and seised in fee of the land, died prior to 1850, the complainants being then from 6 to 12 years old; that they were taken by their mother to the far west, and have ever since resided out of the State; that about 1850 one Mitchell administered on the estate of their father, and, by collusion and fraudulent contrivance with one Henry Craps, pretended to procure an order of the court of ordinary of the district, for the sale of the land, and had the land sold by the sheriff, and by collusion and fraud turned the land over to Henry Craps, who took possession, and continued in possession until his death, in 1878; that the fraud was perpetrated by Henry Craps falsely representing to the court of ordinary that he was one of the heirs and distributees of their father, and petitioning the court to sell the land for partition; that after Henry Craps' death, in 1878, the land remained in possession of the devisees under his will, until, under a decree for partition, it was sold in 1883 to one of his daughters, who has since sold it in parcels to the other defendants, who are now in possession; that all the devisees of Henry Craps, and their grantees, the defendants, have had

full knowledge of the fraudulent character of Henry Craps' title. They allege that the deed from the sheriff to Mitchell in 1850 is void, and passed no title, because, if a sale was really ever decreed by the court of ordinary, that court was without jurisdiction to order a sale, both because Craps was not an heir of John H. Eiffert, and because no notice, by advertisement or otherwise, was served on the complainants. As the reason why complainants have been prevented from sooner asserting their rights, they allege that about 1856 the complainant John Henry Eiffert returned to South Carolina, and inquired of Mitchell about their father's land, and was informed by him that it had been sold for debt by the sheriff of Lexington district; that the fraud has only quite recently come to their knowledge, having been fraudulently concealed from them; and that, since they have learned of the fraud, one of the complainants has visited South Carolina, and seen the old people who might have knowledge of the matters, and has examined the records in the clerk's office. The bill prays that the deed from the sheriff to Mitchell may be set aside, and declared void; that the title be declared vested in the complainants; that an account of rents be taken, and a writ of possession granted.

The defendants answered, denying the alleged frauds, and claiming to be innocent purchasers for value. They pleaded the statute of limitations, and the laches of the complainants in asserting their claim of title, and that the complainants have an adequate remedy at law.

The bill coming on to be heard, the court (Judge Simonton) held that it appeared from the allegations of the bill that the complainants had a plain, adequate, and complete remedy at law, and dismissed the bill. The court, as appears from its opinion, proceeded upon the ground that as it was alleged that the court of ordinary was without jurisdiction of the subject-matter, and its order of sale was unauthorized by law, and none of the heirs of Eiffert were parties to the proceeding, or bound by the order, and therefore, as alleged, that the title to the land had never been divested out of them, the case was, in fact, an attempt to enforce a merely legal title by a bill in chancery, instead of by action or ejectment. The court cited Hipp v. Babin, 19 How. 277, as controlling authority that such a bill must be dismissed.

In the case of Hipp v. Babin, 19 How. 271, cited in his opinion by the learned judge of the court below, the children of a testator filed a bill in equity to recover possession of lands of their father, which had been sold by his executrix during their minority by virtue of an order of court empowering her to make the sale. The complainants relied upon the invalidity of that order, and the consequence nullity of the sale. The Supreme Court held that the remedy at law, by ejectment, was plain, adequate, and complete, and that the bill in equity was rightly dismissed. It was held, also, in Phelps v. Harris, 101 U. S. 375, that, if a deed is invalid upon its face, it is to be repelled by an action at law, and not in equity.

But the complainants in the present case allege, and assign as error in the decree dismissing their bill, that there is also a matter extrinsic the deed itself, or the proceedings in the court of ordinary, viz. the fraud of representing to the court that Craps was an heir and distributee of their father, which gives a court of equity jurisdiction to set aside the deed procured through the fraud. The defendants have set up as a defense the complainants' laches, and the staleness of their claim. If, therefore, it be conceded that their allegations of fraud do make a proper case of equity jurisdiction, it is necessary to examine the bill to see how the complainants account for the long delay from 1851 to 1890, a period of 39 years, and what it is they aver has prevented them from earlier asserting their claim of title. According to the statement of the bill, the youngest of the complainants must have arrived at 21 years of age in 1866. The bill states that the complainant John Henry Eiffert came to South Carolina, in 1856, to inquire about this land, and was told by Mitchell that it had been sold by the the sheriff for debt. He appears to have made no inquiry, as to what had become of the proceeds, how it had been sold, or who was in possession. The deed from the sheriff to Mitchell was then on record, the first line of which begins with the recital:

"Whereas, Henry Craps, one of the heirs and distributees of John H. Eiffert, deceased, filed a petition in the court of ordinary," etc.

All that is alleged in the bill could have been learned in 1856, by the examination of one recorded deed, and by asking who was in possession of the property. The averment of the bill is that:

"Some time last fall, your orators were put upon the track of these frauds, and since that time one of them, at much expense, has visited different places in South Carolina, saw the old people who might have knowledge of the matter, examined the records of the clerk's office, and, by all diligence, have sought to acquire the information contained in this bill. They submit that no laches or imputation of negligence in asserting their claim can be charged against them, as the whole transaction was fraudulently concealed from them."

The only concealment averred is that Mitchell stated in 1856 that the land had been sold for debt. The only allegation which contradicts the statement said to have been made by Mitchell is the recital in the sheriff's deed, and that deed was just as open to inspection in a public record in 1856 as it was 34 years afterwards, in 1890. After so great a lapse of time, after the original purchaser has been dead 12 years, the land, by a decree for the partition of the estate devised by his will, has been sold at public sale, and and resold several times, it is too late to rely upon a fraud 40 years old, which could have been discovered as soon as it was perpetrated, by the inspection of a deed recorded where the record title

to the land was to be looked for. In denying relief in the case of Norris v. Haggin, 136 U. S. 392, 10 Sup. Ct. Rep. 942, the Supreme Court said:

"It is a part of this general doctrine that to avoid the lapse of time, or statute of limitations, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud, as alleged in the bill, were open and public acts. The note and mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings, which were open to everybody's examination, and which were properly well known in the entire community."

The salutary rule of courts of equity for discouraging antiquated demands requires that the bill shall set forth why the complainant has remained so long ignorant of his rights, and if his averments show that he could have learned his rights at any time, if he had chosen to inquire, or to examine a public record, his bill is to be dismissed. Badger v. Badger, 2 Wall. 95; Marsh v. Whitmore, 21 Wall. 185; Brown v. County of Buena Vista, 95 U. S. 157; Naddo v. Bardon, 2 C. C. A. 335, 51 Fed. Rep. 493. In Stearns v. Page, 7 How. 829, it was said by the Supreme Court:

"And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

See, also, Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. Rep. 418, and Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. Rep. 833.

Considering how easily all the facts alleged in the bill could have been discovered at any time since March, 1851, when the sheriff's deed was recorded, it cannot be said that ordinary diligence has been exercised; and considering that Henry Craps resided on the property for 27 years, — until his death, in 1878, — and the changes and the sales of the property since that date, it is clear that the time for the complainants, to have attacked the sheriff's deed was certainly not later than during the 27 years which Henry Craps lived after he took possession, and that they have stated no fact sufficient to relieve them of the imputation of laches.

Our conclusion is that the Circuit Court was right in dismissing the bill without prejudice to an action at law, and the decree is affirmed, with costs.

NOTE.—Courts of equity are always solicitous of the rights of all parties and lend an assisting hand when a case deserving it is made out by the party asking relief. There are certain well defined rules, however, by which these courts of justice are governed in granting relief. One cardinal requisite is, that the party seeking a favor at the hands of equity must show himself deserving and worthy. He must be diligent, and especially must he be so when by reason of his supineness and lethargy valuable property rights have been made and acquired by parties supposing themselves entitled to the property they claim. Questions under this doctrine arise, perhaps, more often in cases involving title to or interests in lands, than in any other. And these courts are especially loth to lend their aid to a party to recover property where it has been bought and a right asserted by another; large and exceedingly valuable improvements made, and the value greatly enhanced by reason of such. Especially when the real owner could have averted this great expenditure by promptly asserting his rights and putting the adverse claimant on notice that there was an adverse claim that would be asserted against him. Often cases in the west where towns spring up in a year or a little more are brought to recover from the occupants after varying lengths of time, and it is unquestionable that equity will the more reluctantly grant relief in such cases as these, when at all, that in such as bear upon their face the impress of the utmost good faith and diligence.

Courts of chancery, likewise, are reluctant to enforce a claim where the party applying for relief has slept on his rights for a great length of time; and especially is this the case when material evidence has been lost by the mutations of time, and the facts dimmed in the memory of the witnesses and obscured by the intervention of many years. The courts in denying relief in these cases proceed upon the theory that it would be as great, if not greater injury, to attempt to resurrect old demands after the destruction of evidence and great changes in values and perhaps bring disaster and ruin upon hundreds whose rights have intervened, than to allow such claims; and prefer to let the dead past bury its dead and refuses to lift the mantle of repose with which time has for so long a time covered by gone transactions. See, as instructive cases on this question, Gibson v. Herriott, 17 S. W. Rep. 589. In such cases the courts presume a grant from the long lapse of time for the respose of titles and the peace and security of society. Martin v. Skipwith, 6 S. W. Rep. 514; Fletcher v. Fuller, 7 S. C. Rep. 667; Snyder v. Snover, 27 Atl. Rep. 1013. Lapse of time is itself a bar to a suit for recovery in equity where the party has been long negligent in asserting his rights and been under no disability. This doctrine is treated with much learning and many authorities bearing thereon are cited in the case of U. S. v. Beebe, 17 Fed. Rep. 36. And this case was affirmed by the United States Supreme Court on appeal. See same case 127 U. S. 388. A strong case on this doctrine is that of Felix v. Patrick, 12 S. C. Rep. 862. In that case it was held that a delay of 28 years would bar a right of recovery, even in the face of the fact that the land may have been acquired, originally, by fraud, the *cestui que trust* suing therefor, not having shown reasonable diligence in unearthing the same. This, too, was an action to enforce an implied trust; to impress certain lands with that character. But the court properly held that the party aggrieved should have sooner asserted her rights, and that the implied trust would be barred by laches and the statute of limitations. Indeed this is the uniform doctrine of all the courts. See Boone v. Childs, 10 Pet. 177; Wood Lim. Sec. 215; Angell Lim. Sec. 178; Kane v. Bloodgood, 7 John. Ch.—; Ewing v. Shannahan, 20 S.

W. Rep. 1065; Curtiss v. Daniel, 23 Ark. 363; Bland v. Fleeman, 23 S. W. Rep. 4, and many other cases that might be named.

Nor is the doctrine that laches will bar a trust confined to those trusts which must arise by operation of the law or the status of the parties, that is, constructive or implied trusts, but it is carried in some instances with manifest propriety to cases of actual technical, direct trusts. These latter of course, are such as are created by the instrument imposing the trust relation itself. Such as are created by deeds of trusts, powers of attorneys, etc. But in such a case the possession of the trustee being consistent with his relation, it requires much stronger facts to make a case that will be barred by the laches of the *cestui que trust* than in cases of constructive trusts. The books all seem to agree that these direct trusts can, under certain circumstances, and in certain cases, be barred as other trusts or rights. In such cases, however, it is necessary that the trustee assert his claim to title in a way that cannot be misunderstood. It must be done in an open, notorious and hostile manner. Moreover, such adverse assertion of ownership must be brought home to the knowledge of the *cestui que trust*, and he must be laboring under no disability, and capable of suing, before he can be charged with laches in prosecuting his rights in the trust property. Bland v. Fleeman, *supra;* Lemoine v. Dunklin Co., 51 Fed. Rep. 487; Naddo v. Rardon, *Id.* 493; Hammond v. Hopkins, 418; Gibson v. Harriott, *supra.* There must be such a plain and open assertion of an adverse right brought to the knowledge of the *cestui que trust* as will require a person of ordinary prudence to act as upon an asserted adverse title. Authorities, *supra.*

But it is not necessary that the parties whose rights are affected have actual notice of the hostile holding to charge him with laches. In the language of the Circuit Court of Appeals for the Eighth Circuit, in Rugan v. Sabin, 53 Fed. Rep. 415,—"Nor can a vendor industriously close his eyes, stop his ears or refuse to believe the evidence of his senses when notice of fraudulent practices are placed before him and thus escape from the application of this principle of law. Notice of facts and circumstances which would put a man of ordinary intelligence upon inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonable diligent inquiry would disclose." This well states the law in respect of notice such as a party must pursue with diligence before he can come into equity and at the same time escape the imputation of notice and consequent laches. To the same effect are the well considered cases of Norris v. Hagan, 28 Fed. Rep. 275, which was affirmed on appeal to the Supreme Court; Teal v. Slaven, 40 Fed. Rep. 774; Wood v. Carpenter, 101 U. S. 139.

And it is generally, if not always sufficient that a deed or decree or other evidence of a hostile assertion of title be placed of record when the person to be affected with such notice is capable of suing and laboring under no disability to charge him with the necessary notice. Cases, *supra.* Martin v. Skipwith, *supra.* To the same effect see Percy v. Cockrill, 53 Fed. Rep. 872 and authorities there cited; King v. Carmichael, 35 N. E. Rep. 509. In short, the whole doctrine of all the courts, gathered from all the authorities, seems to be, that to avoid the imputation of laches, the party must come into equity without fault on his part. He must have used all diligence to assert his rights in time. He must have done so at the first reasonable opportunity; especially where values have changed, perhaps a hundred or a thousand fold. Where a great many years have elapsed and some or many of the material witnesses are dead, and values are greatly changed, or perhaps where they have not, the court will clothe the transactions of the past with the mantle of repose and refuse to dig up old and antiquated demands that should have been earlier asserted and perhaps thereby do a greater injustice than to be passive.

That in all cases of constructive trusts the plea of laches, when well taken, is a bar to a recovery by the *cestui que trust.* That even in cases of direct and technical trust laches is a good defense to an action to enforce such a trust after the *cestue que trust* has been supine for many years, values have greatly changed, and the trustee has asserted an adverse title in such a way as could not be mistaken by one of ordinary prudence, when he puts the *cestui que trust* at arms length, as it were, or, where the trustee, being capable of suing, could, by the means of reasonable diligence and following up any information that would put a prudent person upon inquiry learn of the facts of such adverse assertion of right.

W. C. RODGERS.

Nashville, Ark.

BOOKS RECEIVED.

Lawyers' Reports Annotated, Book XXI. All Current Cases of General Value and Importance Decided in the United States, State and Territorial Courts with Full Annotation, by Burdett A. Rich, Editor, and Henry P. Farnham, Assistant Editor. Aided by the Publisher's Editorial Staff and, Particularly in Selection, by the Reporters and Judges of each Court. (Cited 21 L. R. A.) Rochester, N. Y. The Lawyers' Co-operative Publishing Company, 1893.

HUMORS OF THE LAW.

The court had assigned an attorney to defend the prisoner for larceny, but when the case was called the prisoner surprised everybody by announcing that he would defend himself.

"What's the matter with the attorney?" asked the court.

"Nothing, your honor," replied the prisoner.

"Then why do you wish to defend yourself?"

"Because, your honor," responded the prisoner confidently, "the case is likely to go against me, and if it does I want to be in a position to enter a plea of self-defense."

The following are grounds for which divorces have been granted by the Italian courts:

For calling his wife's sister a thief.

For beating his wife's pet dog.

For constantly chewing tobacco.

For cutting his wife's curls without her consent.

For refusing to take his wife out for a walk.

For refusing to sew on her husband's trousers buttons.

For forcing his wife to sit up until after midnight.

For the wife staying in bed until noon.

For refusing to let her husband go too near the kitchen fire on a cold day.

For dragging her husband out of bed by the beard.

For the wife strolling around town and shopping instead of attending to her domestic duties.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION.—Plaintiff agreed to accept a certain sum in satisfaction of his claim against defendant, and gave a receipt for such sum, as actually paid, on defendant's promise to remit, but no money was actually paid or remitted: Held, that there was no accord and satisfaction, and plaintiff could recover on the original claim.—YAZOO & M. V. R. CO. v. FULTON, Miss., 14 South. Rep. 271.

2. ACTIONS—Transitory Actions—Contract.—A cause of action for breach of an executory contract during the life and after the death of the promisor is transitory, and the action may be maintained against the administrator of the promisor without reference to where the contract was made, or to the fact that it was to be performed in a foreign country.—MCCANN v. PENNIE, Cal., 35 Pac. Rep. 158.

3. ADMINISTRATION—Claims.—Where a debt was incurred by an executor under a will charging the estate with the payment of testator's debts, and some of the secured debts due testator were transferred to the creditor, the latter is entitled to the priorities belonging to the original creditors, and the balance of the debt is of like rank with debts of a similar character due by testator at his death.—PAYNE v. DUNDEE LAND & MORTG. INVESTMENT CO., Miss., 14 South. Rep. 269.

4. ADMINISTRATION—Executor as Residuary Legatee.—Where an executor, who is a residuary legatee, executes a bond to pay all the debts and legacies of the testator, he and the sureties become absolutely liable, to the extent of the penalty of the bond, for all debts and legacies, regardless of the amount or value of the assets of the estate; and, where a specific legacy is not paid when due, the legatee may, without obtaining an order of allowance by the Probate Court, and upon demand and refusal of payment, maintain an action for the recovery of such legacy against the obligors of the bond.—KREAMER v. KREAMER, Kan., 35 Pac. Rep. 214.

5. ADMINISTRATION — Husband—Co-administrator.—The right to administer a deceased wife's estate being given a husband by Code, § 1376, in case she dies intestate, and by section 2166 in case she leaves a will without naming an executor, his right to letters of administration is not affected by the pendency of a contest over a will which named no executor.—IN RE MEYERS' ESTATE, N. Car., 18 S. E. Rep. 689.

6. ADVERSE POSSESSION—Estoppel.—Where an owner executes and places upon record a warranty deed purporting to convey the complete title of land occupied by himself and family, his subsequent possession will generally be considered as in subserviency to the record title.—SELLERS v. CROSSAN, Kan., 35 Pac. Rep. 205.

7. APPEAL—Service of Notice.—A notice of appeal may be served by mail under Code Proc. § 1441, which authorizes the Supreme Court to make rules governing the manner of serving notices of appeal, and under rule 26, made in accordance therewith.—HORR v. ABERDEEN PACKING CO., Wash., 35 Pac. Rep. 125.

8. APPEALLABLE ORDERS.—An order removing a guardian required him to pay over a certain amount as funds in his hands belonging to the estate of his wards, and that he personally pay the costs of the suit: Held, that the guardian had such an interest in the subject-matter as entitled him to appeal.—IN RE HILL'S ESTATE, Wash., 35 Pac. Rep. 131.

9. APPEAL FROM JUSTICE'S COURT. — The successor of a justice of the peace has the power, under the direction of the District Court, to supply omissions in a transcript of his predecessor, and for that purpose may file with the clerk of the District Court a new and completed transcript from the official records in his possession.—ST. LOUIS & S. F. RY. CO. v. HURST, Kan., 35 Pac. Rep. 211.

10. APPEAL FROM JUSTICE'S COURT.—If, in an appeal from justice court, the sufficiency of the sureties in the undertaking is excepted to as provided in section 6133, Comp. Laws, and they or other sureties do not justify as required in said section, the appeal, on motion of respondent in Circuit Court, should be dismissed.—BARBER v. JOHNSON, S. Dak., 57 N. W. Rep. 225.

11. ARBITRATION AND AWARD.—Where one voluntarily submits to arbitration all matters in dispute between himself and another, and the amount of the award is paid by his sureties without exception or appeal, the award will not afterwards be set aside for technical irregularities. — WOELFEL v. HAMMER, Penn., 28 Atl. Rep. 147.

12. ARBITRATION AND AWARD — Collateral Attack. — Where an award under a common law arbitration is made without notice to the parties, the award is a nullity unless notice was waived, and it may be colla-

terally attacked.—SHIVELY v. KNOBLOCK, Ind., 35 N. E. Rep. 1028.

13. ATTACHMENT — Affidavit. — Where an attachment has been merged in a judgment, a claimant of the attached property cannot, in a trial of the right of property, question the sufficiency of the affidavit on which the attachment issued; and, if he could, it would have to be by special plea, in the nature of abatement, before pleading to the merits.—ROOS v. LEWYN, Tex., 24 S. W. Rep. 538.

14. ATTACHMENT — Lien. — Mansf. Dig. § 324, which gives the right to attach defendant's property as security for the "satisfaction of such judgment as may be obtained," is intended only to prevent alienations and incumbrances subsequent to the levy, and not to cut off, destroy, or affect the prior rights, equities, or incumbrances of third persons. — TENNANT v. WATSON, Ark., 24 S. W. Rep. 495.

15. ATTACHMENT OF WIFE'S SEPARATE ESTATE. — Where, in an action against a wife and her husband on notes made by the wife in Iowa while in business there, plaintiff attached certain land of the wife in Texas, it was not necessary that plaintiff should prove the title to the property to be in the wife.—MERRIELLES v. STATE BANK OF KEOKUK, Tex., 24 S. W. Rep. 564.

16. ATTORNEYS—Powers.—It is within the scope of an attorney's authority to agree that, if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the Appellate Court.—HALLIDAY v. STUART, U. S. S. C., 14 S. C. Rep. 302.

17. BAIL—Recognizance. — The principal in recognizance pleaded guilty, and was fined, upon another charge, in the same court in which his presence was required by the recognizance, and was taken by a deputy sheriff, to the clerk's office, where the fine was paid; the whole time taken not exceeding five minutes: Held, that the detention did not release the sureties on the recognizance.—PEOPLE v. ROBB, Mich., 57 N. W. Rep. 257.

18. BANKING—Collections.—Plaintiff deposited a draft with the bank of H for collection, which forwarded it for collection to defendant bank, and defendant collected it after the bank of H failed. The arrangement between the banks was that each should daily remit to the other every collection as made, but this was not strictly complied with by the bank of H, and the final drafts sent by it to defendant in payment of balance were dishonored: Held, that defendant was liable to plaintiff for the collection, defendant not being a purchaser of the draft, but merely a subagent for its collection.—STEVENSON v. FIDELITY BANK OF DURHAM, N. Car., 18 S. E. Rep. 695.

19. BANKS AND BANKING — Authority of Cashier. — A bank is bound by the act of its cashier in drawing checks in its name, though with the intent of embezzling the proceeds, and payment of the checks by the drawee is binding on the bank.—PHILLIPS v. MERCANTILE NAT. BANK OF CITY OF NEW YORK, N. Y., 35 N. E. Rep. 982.

20. BOND OF DEPUTY SHERIFF.—In an action of debt by a sheriff against his deputy upon his bond, conditioned for the faithful performance of his duties as deputy sheriff, and to account for and pay over, as required by law, all money which may come into his hands by virtue of said office, the right of action does not accrue to said sheriff at the time of the default of such deputy, and the statute of limitations does not begin to run against said action until said sheriff has paid the debt occasioned by said default, or some part thereof.—ADKINS v. FRY, W. Va., 18 S. E. Rep. 737.

21. CARRIERS— Limiting Liability.— A common carrier has the right by special contract to limit its liability to injuries received on its own line.—TEXAS & P. RY. CO. v. SMITH, Tex., 24 S. W. Rep. 565.

22. CARRIERS—Live Stock—Damages.—The measure of damages for cattle killed or rendered worthless by the negligence of a carrier while transporting them is the value at the place of delivery, and, as to those sustaining less injuries, the measure is the difference between their value as delivered and what it would have been had they been transported with proper care.—TEXAS & P. RY. CO. v. KLEEPER, Tex., 24 S. W. Rep. 567.

23. CARRIERS—Passenger — Negligence. —A flight of steps decended from a railroad station about 15 feet to an unimproved street, passing under the tracks, with uneven surface, being a natural ravine, down which ran a large stream, making the ground marshy. It was the universal custom for persons going across the railroad to cross over the tracks: Held, that there was no absolute obligation upon a passenger alighting from a train on a dark night, the street being unlighted, to use it in crossing the railroad to reach his home.—CHICAGO, M. & ST. P. RY. CO. v. LOWELL, U. S. S. C., 14 S. C. Rep. 281.

24. CARRIERS OF PASSENGERS— Assault. — Plaintiff, on entering defendant's train, was struck and jostled by three men, and, missing his pocketbook, he shouted for help, saying that he was being robbed, and accused the men of robbing him. The pocketbook was found on the floor, and restored to him, but the dispute was renewed, and plaintiff, though calling loudly for help, was set upon, and severely injured. No one came to his assistance: Held, that though defendant employed a proper number of train and depot men to protect passengers in ordinary contingencies, it was liable if any of these could have heard plaintiff's cries, and failed to respond thereto.—WRIGHT v. CHICAGO, B. & Q. R. Co., Colo., 35 Pac. Rep. 196.

25. CHATTEL MORTGAGES — Execution.—A mortgage of personal property is valid, as between the parties thereto, and as to subsequent purchasers and incumbrancers having actual notice of such mortgage, though it may not be attested by any subscribing witness.— WALTER A. WOOD MOWING & REAPING MACH. CO. v. LEE, S. Dak., 57 N. W. Rep. 238.

26. CHATTEL MORTGAGES—Payment.—A debt secured by a deed of trust is not satisfied by the creditor's breach of his agreement with the debtor to take certain notes in satisfaction thereof.—LOW v. COLEMAN, Miss., 14 South. Rep. 267.

27. CHATTEL MORTGAGE OR ASSIGNMENT.—A chattel mortgage executed by an insolvent on her entire stock of goods is not converted into a general assignment for the benefit of creditors by the fact that the mortgagor is unable to continue business, that the debt is made payable on demand, and that the mortgagee is authorized to take immediate possession.—MARQUESE v. FELSENTHAL, Ark., 24 S. W. Rep. 493.

28. COAL LEASES.— Defendant, having sunk a shaft into coal on plaintiff's land, took a 10-year lease to mine under plaintiff's whole tract at a certain royalty per bushel, to mine as a minimum 10,000 bushels each year, and, if less, to pay the royalty on 10,000 bushels. The seam became unworkable in 8 years: Held, that defendant must pay the minimum royalty for the rest of the term.—TIMLIN v. BROWN, Penn., 28 Atl. Rep 236.

29. CONFLICT OF LAWS—Carrier's Liability.—A contract made in Boston with plaintiff's daughter, entitling plaintiff to a passage from Queenstown by defendant's British steamship line, provided that if plaintiff chose not to embark the money should be refunded. On plaintiff's giving notice to defendant in Cork that she wished to embark at a certain time, this contract was exchanged for another, assigning plaintiff to a particular ship, and providing for her board on the voyage: Held, that the old contract was canceled on good consideration, and the new one determined the rights of the parties.—O'REGAN v. CUNARD STEAMSHIP CO., Mass., 35 N. E. Rep. 1070.

30. CONSTITUTIONAL LAW—Amending Charter of City. —Const. art. 11, § 8, which provides that the charter of a city "may be amended at intervals of not less than two years by proposals therefor, submitted by the leg-

islative authority of the city to the qualified electors thereof," refers only to amendments made by and at the instance of the officers and electors of the city.—PEOPLE v. CITY OF CORONADO, Cal., 35 Pac. Rep. 162.

31. CONTRACTS—Breach— Default.— Default in a payment on a contract for work is a breach justifying a rescission and action *quantum meruit* by the contractor.—PORTER v. ARROWHEAD RESERVOIR CO., Cal., 35 Pac. Rep. 146.

32. CONTRACTS — Consideration. —The release of a chattel mortgage on a stock of goods is a sufficient consideration for the execution of an agreement by the mortgagor stating that he holds the goods as consignee of the mortgagees, to be sold on their account, and authorizing them to take possession whenever they deem themselves insecure.—NORRIS v. VOSBURGH, Mich., 57 N. W. Rep. 264.

33. CONTRACT — Mortgage—Validity.—The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded.—SHELDON v. PRUESSNER, Kan., 35 Pac. Rep. 201.

34. CONTRACT—Parol Evidence.—A unilateral promise or agreement, in writing, to pay for specified personal property, is binding if upon sufficient consideration; and, in a case not within the statute of frauds, the consideration may be shown by parol. But the writing may not be contradicted by oral evidence, though an issue may be raised in respect to the consideration, or the writing may, for other valid reason, be shown to be inoperative.—HORN v. HANSEN, Minn., 57 N. W. Rep. 315.

35. CONTRACTS—Parol Evidence.—In an action on a written contract, by which defendant agreed to furnish pupils if plaintiff would continue his school, defendant may show that it was agreed that the instrument should not go into effect until plaintiff should procure 20 signatures, as this does not contradict the terms of the instrument, but shows a collateral agreement postponing its legal operation until the happening of a contingency.—KELLY v. OLIVER, N. Car., 18 S. E. Rep. 698.

36. CONTRACT — Pleadings.—A contract may be declared in *haec verba*, or according to its legal effect. When the former mode is adopted, the instrument incorporated into the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege had he elected to set it forth by averment.—MORE v. ELMORE COUNTY IRRIGATION CO., Idaho, 35 Pac. Rep. 171.

37. CONTRACTS—Rescission.—In an action by G on a contract whereby S and E agreed to build for G, it being claimed by S that it was merely a surety, and was released by a rescission, a requested charge that it could not escape the obligations of the contract unless there had been an agreement by all the parties to rescind was properly denied, as, if S was a surety, the fact that E was not a party to the agreement to rescind would make no difference.—GOTTSTEIN v. SEATTLE LUMBER & COMM. CO., Wash., 35 Pac. Rep. 133.

38. CONTRACTS — Validity—Consideration.—Creditors of an insolvent contractor held liens for materials furnished to erect a building, and agreed with him, in writing, to assign their liens to the owner of the building if he would pay the money still due, before a certain day, by first paying in full the claims for labor, and then dividing the remainder proportionately among all other lien claimants: Held, that the agreement was valid, and binding on each signer, as the contract of each was a sufficient consideration for the contracts of the others.—WILSON v. SAMUELS, Cal., 35 Pac. Rep. 148.

39. CONVERSION. — Where a co-tenant undertakes, without authority, to sell the whole property, the vendee does not become liable to the other tenant for a conversion of the latter's share unless it is lost or destroyed through the vendee's acts.—WORSHAM v. VIGNAL, Tex., 24 S. W. Rep. 562.

40. CONVERSION — Evidence.—A purchaser of cattle, who drives from the pasture a greater number than he has bargained for, is guilty of a conversion of the excess to his own use, even though he may have been acting under a mistake; and, in an action for such conversion, evidence as to the contract of purchase is admissible.—WILLIAMS v. DEEN, Tex., 24 S. W. Rep. 536.

41. CORPORATE STOCK—Assignment.—The obligor on a bond deposited with plaintiff a certificate of corporate stock as collateral security, and subsequently assigned such certificate to him, in trust for the obligees on the bond, in consideration of a release from liability thereon; the assignment providing that the obligor should not be released till a perfect, unincumbered title should be transferred to plaintiff on the books of the corporation. Plaintiff accepted the certificate, and repeatedly, but ineffectually, demanded such transfer on the books: Held, that the absolute title passed to plaintiff as against creditors of the obligor.—WEBER v. BULLOCK, Colo., 34 Pac. Rep. 183.

42. CORPORATION—Notice.—The knowledge of S, who was the principal promoter and organizer of a corporation, and who acquires his knowledge as such, and who, upon its organization, becomes its manager, is the knowledge of the corporation.—HURON PRINTING & BINDERY CO. v. KITTLESON, S. Dak., 57 N. W. Rep. 233.

43. CORPORATION—Contract.—In an action against a corporation for its breach of a verbal contract to purchase logs, evidence by plaintiff that he delivered the logs to it, but that it did not receive them, and that he subsequently sawed them into lumber, does not so clearly show an executed contract of sale by delivery and acceptance of the logs as will take the case out of Code, § 683, requiring contracts with domestic corporations to be in writing; and it is error to instruct the jury to find for plaintiff, though his evidence is uncontradicted.—CURTIS v. PIEDMONT LUMBER, RANCH & MIN. CO., N. Car., 18 S. E. Rep. 705.

44. CORPORATION— Foreign Corporations — Assignment.—A foreign corporation, having authority, under the laws of its domicile, to make a general assignment for the benefit of its creditors, may make such an assignment in New York, where it is doing business, as Laws 1890, ch. 564, § 48, declaring void every transfer or assignment by a corporation in contemplation of insolvency, refers only to domestic corporations.—VANDERPOEL v. GORMAN, N. Y., 35 N. E. Rep. 932.

45. CORPORATION—Foreign Corporations—Organization.—Where persons have incorporated under the laws of another State, filed a certificate as required by the laws of that State, and a certificate in New York, as required of foreign corporations, a person dealing with it cannot object to its title to land in New York on the ground of irregularity in its organization, it being a corporation *de facto*, and any question affecting its right to transact business because of the irregularity being a matter of inquiry for the State under whose laws it was incorporated.—LANCASTER v. AMSTERDAM IMP. CO., N. Y., 35 N. E. Rep. 964.

46. CORPORATIONS—Organization— Estoppel.— Under Act April 29, 1874, requiring original certificates of incorporation, with all indorsements, to be recorded in the office of the recorder of the county where the chief operations are to be carried on, whereupon the subscribers, etc., shall be a corporation under the charter, subscribers who have received their charter, but failed to record their certificate, are liable, as partners, for company debts.—GUCKERT v. HACKE, Penn., 28 Atl. Rep. 249.

47. CORPORATIONS—Subscription for Stock.—Conceding that the provisions of section 130, ch. 34, Gen. St., in relation to calls for subscriptions for stock in manufacturing corporations, is applicable to the calls for such subscriptions set forth in the complaint, held, that the statement therein that such calls were duly made by the directors, and notice thereof duly given to the stockholders, is a sufficient allegation of per-

formance of the requisite conditions on the part of the plaintiff.—WALTER A. WOODS HARVESTER CO. v. ROBBINS, Minn., 57 N. W. Rep. 817.

48. COUNTIES—Contract for Construction of Bridge.—A contractor may recover of a county the reasonable value of the labor and additional materials furnished to tear down and rebuild the substructure of a bridge which he has built in compliance with his contract with the county, where such work is done by direction of the county's superintendent of the work.—BOARD OF COM'RS OF CARROLL COUNTY v. O'CONNER, Ind., 35 N. E. Rep. 1006.

49. COUNTY Officers—Election.—Const. art. 2, § 10, providing that no collector or holder of public moneys shall be eligible to any office until he have paid over all sums for which he may be liable, does not vacate an election of such person, but only demands that he shall settle his default before being inducted into office.—SHUCK v. STATE, Ind., 35 N. E. Rep. 993.

50. COURTS—Judge—Disqualification.—A judge who while holding the office of district attorney, heard the complaint of the prosecuting witness, reduced it to writing, caused it to be signed and sworn to by him, and attested the same, has acted as counsel for the State, and is therefore disqualified from presiding at the trial of defendant for the offense charged in the complaint, under Code Crim. Proc. art. 569, which provides that "no judge shall sit in any cause where he has been of counsel for the State or the accused."—TERRY v. STATE, Tex., 24 S. W. Rep. 510.

51. COVENANT—Warranty—Liability of Devisees.—Rev. St. 1881, § 2442, which limits the right of action against heirs, devisees, or distributees for debts of their decedent to creditors who were unable to present their claims against the estate while in course of administration by reason of insanity, infancy, or nonresidence, does not apply to an action for breach of a covenant of warranty in a deed executed by decedent, where the grantee remained in undisturbed possession until long after her death; and decedent's devisees are liable to him for his damages, to the extent of property received by them under the will.—HARMON v. DORMAN, Ind., 35 N. E. Rep. 1025.

52. COVENANT AGAINST INCUMBRANCES—Notice.—In an action by a grantee for breach of a covenant against incumbrances, the grantor, who had incumbered the land, cannot invoke the doctrine of notice arising from circumstances sufficient to provoke inquiry by the grantee.—PARISH v. WHITE, Tex., 24 S. W. Rep. 572.

53. CRIMINAL EVIDENCE—Burglary.—A court cannot charge that, because all the evidence was that the family was in a house at the time defendant entered, he should be found guilty of burglary in the first degree, as it was for the jury to pass on the credibility of the evidence as to the presence of the family.—STATE v. ALSTON, N. Car., 18 S. E. Rep. 692.

54. CRIMINAL EVIDENCE—Murder—Confessions.—Statements of a person accused of murder, which tend to explain incriminating circumstances brought against him, and to show him innocent of any crime, are not confessions, are admissible, though not made voluntarily, and may be proved false by the prosecution after it has proved that accused made them.—MORA v. PEOPLE, Col., 35 Pac. Rep. 179.

55. CRIMINAL EVIDENCE—Theft.—On a prosecution for theft of property whose owner is alleged to be unknown to the grand jurors, statements made by defendant's father, since deceased, claiming the property as his own, are inadmissible.—ANDERSON v. STATE, Tex., 24 S. W. Rep. 517.

56. CRIMINAL LAW—Arson.—Rev. St. 1881, § 1753, provides that an indictment for an offense on property belonging to partners or joint owners, or in possession of a tenant, need only allege the ownership in the firm, or in any one of such partners, owners, or tenants. An indictment for arson alleged property in B. Bros., and it appeared that the building belonged to P and D B, who were partners and brothers, trading as B. Bros. in said building: Held, that the variance was immaterial after verdict.—KRUGER v. STATE, Ind., 35 N. E. Rep. 1019.

57. CRIMINAL LAW—Assault with Intent to Kill.—Where, in a prosecution for assault with intent to murder, defendant alleged self-defense, in that prosecutor slapped him in the face, and was in the act of drawing his pistol when the assault was committed, the court did not err in failing to charge the law of retreat, for, if defendant's evidence was true, the danger to him was imminent, and he could not have been required to retreat.—LEE v. STATE, Tex., 24 S. W. Rep. 509.

58. CRIMINAL LAW—Cross-examination.—Defendant testified in his own behalf, and on his cross-examination the prosecuting attorney asked him as to his having fled soon after the crime was committed, to evade prosecution. On his direct examination defendant was questioned generally about his connection with the crime, but not as to his movements after the offense: Held, that the questions complained of were proper, as affecting the credibility of the witness.—STATE v. DUNCAN, Wash., 35 Pac. Rep. 117.

59. CRIMINAL LAW—False Pretenses.—To obtain goods on credit from a company, defendant made a true statement, in writing, of his financial condition and added the following promise: "If any change occurs to lessen my responsibility, I bind myself to give the company immediate notice; otherwise, I shall be held for transactions thereafter made, as under this statement, this standing good till notice of change:" Held, that defendant was not criminally liable, under Gen. St. 1883, § 884, where his financial condition subsequently changed for the worse, and he purchased goods thereafter from the company on credit without giving notice of the change.—MORRIS v. PEOPLE, Colo., 35 Pac. Rep. 188.

60. CRIMINAL LAW—Homicide—Aiding and Abetting.—One may be convicted of murder in the second degree for aiding and abetting, though the person who did the killing had been acquitted.—STATE v. WHITT, N. Car., 18 S. E. Rep. 715.

61. CRIMINAL LAW—Homicide—Intoxication as a Defense.—Intoxication of the accused to such a degree as to render him incapable of malice in the perpetration of a homicide is a special defense, like a plea of insanity, and puts the burden of proving it upon the party urging it; and its truth must be established by a fair preponderance of evidence.—STATE v. HILL, La., 14 South. Rep. 294.

62. CRIMINAL LAW—Kidnapping.—On a prosecution for kidnapping one S, it appeared that defendant, while intoxicated, met S in the evening, and, after giving her several drinks of whisky, made arrangements with her to meet him after the other members of her family had retired, for the purpose of taking a drive. They drove to a city, where they had sexual intercourse, and remained together for five days, when, at her request, he brought her back: Held, not to constitute kidnapping under Rev. St. 1881, § 1915, which provides that whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons, any person, with the intention of having such person carried away from his place of residence, is guilty of kipnapping, as the case is destitute of any element of fraud.—EBERLING v. STATE, Ind., 35 N. E. Rep. 1028.

63. CRIMINAL LAW—Perjury.—Where, on a trial for perjury alleged to have been committed by defendant when on trial for swindling a bank by means of a draft, the draft is set out in the indictment by way of inducement, a variance between the draft and the description thereof in said indictment is immaterial.—KING v. STATE, Tex., 24 S. W. Rep. 514.

64. CRIMINAL LAW—Sentence—Ex post Facto.—Laws 1892, ch. 662, amending Pen. Code, § 106, whereby the penalty for perjury under the earlier act, of "imprisonment for not less than two years nor more than ten years," is changed to "a term not exceeding ten years,"

is not *ex post facto* as to perjury committed prior to its enactment, as it reduces the penalty therefor.—PEOPLE V. HAYES, N. Y., 35 N. E. Rep. 951.

65. CRIMINAL LAW—Speedy Trial.—Where an information must be dismissed if defendant be not brought to trial within 60 days after the information is filed, unless good cause to the contrary be shown (2 Hill's Code, § 1369), it is not sufficient excuse for failure to try defendants within such time, that no term of court for which a jury was called in session in the county during such time, in the absence of any good reason why a jury was not called.—STATE V. BRODIE, Wash., 35 Pac. Rep. 137.

66. CRIMINAL LAW—Verdict.—Under Acts 1889, § 12, which provides that an accused 16 years of age or less, convicted of a crime punishable by imprisonment in the penitentiary for five years or less, shall be confined in the reformatory, provided "the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or penitentiary," the verdict need contain no finding as to the age of defendant, but it is sufficient if it specifies the place of his confinement.—COLE V. STATE, Tex., 24 S. W. Rep. 510.

67. CRIMINAL PRACTICE — Perjury. — A conviction of perjury before a grand jury is unauthorized where it does not affirmatively appear that defendant was sworn, since the presumption of his innocence overcomes the presumption that the grand jury duly required him to take the oath.—SLOAN V. STATE, Miss., 14 South. Rep. 262.

68. CRIMINAL TRIAL—Challenge of Jurors.—The State has the right to have rejected, as jurors, parties who declare that under no circumstances would they render a verdict of guilty, based solely upon circumstantial evidence, and to propound to jurors, on their *voir dire*, questions directed to the ascertainment of that fact.—STATE V. FRIER, La., 14 South. Rep. 296.

69. CRIMINAL TRIAL — Changing Plea. — The rule is that where a defendant has pleaded guilty in a criminal cause, and sentence has been passed upon him, it is within the sound discretion of the trial court to permit the plea to be withdrawn, and to allow a plea of not guilty entered. If the court abuses its discretion, error may be assigned therefor.—STATE V. YATES, Kan., 35 Pac. Rep. 209.

70. CRIMINAL TRIAL — Jurors — Ability to Read. — Const. § 244, provides that every elector shall be able to read the constitution. Section 264 provides that a juror must be a qualified elector, and able to read and write: Held, that a juror who cannot read and write is disqualified, though a registered elector.—MABRY V. STATE, Miss., 14 South. Rep. 267.

71. DEATH BY WRONGFUL ACT.—As no one is authorzed to sue under the employer's liability act for injuries resulting in death except the personal representative of deceased (Code, § 2590), a suit by a mother for the death of her son is no bar to a suit by the personal representative on the same cause of action.—TENNESSEE COAL, IRON & R. CO. V. HERNDON, Ala., 14 South. Rep. 287.

72. DEEDS — Execution — Evidence. — On an issue whether plaintiff, joined by her mother and sister, executed a certain deed of land, plaintiff's sister testified that the deed was executed. Another witness testified that plaintiff admitted to him that she had executed such deed, and that she laid no claim to the land thereby conveyed. Plaintiff testified positively that she never executed the deed, but contradicted, herself in several material statements: Held, sufficient to sustain a finding that she executed the deed.—BALLASTER V. MANN, Tex., 24 S. W. Rep. 561.

73. DEED—Restriction as to Use of Premises.—A condition in a deed, prohibiting the use of the land for the manufacture or sale of intoxicating liquors, is binding, into whosesoever hands the land may thereafter come; and the grantor may enforce a forfeiture for breach of the condition against a purchaser from the grantee, though the condition does not in express terms purport to bind the "heirs and assigns" of the grantee.—ODESSA IMPROVEMENT & IRRIGATION CO. V. DAWSON, Tex., 4 S. W. Rep. 576.

74. DEED — Rule in Shelley's Case.—A conveyance of land to the grantee for life, "and then to the heirs of her body, in fee-simple, and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution," does not vest a remainder in her children who die during her life, so that she can inherit from them.—HARDAGE V. STROOPE, Ark., 24 S. W. Rep. 490.

75. DEED — Words of Inheritance. — A deed reciting that the grantors "hath sold unto J, in trust for M, all that tract of land [describing it], unto the said J, agent, his heirs and assigns, forever. The said [grantors] hath a right to convey the same, and by these presents doth convey the same, in fee simple, unto J, agent,"—gives M an equitable fee, though words of inheritance are omitted in the limitation.—FULBRIGHT V. YODER, N. Car., 18 S. E. Rep. 713.

76. DISCOVERY — Examination of Adverse Party. — Under provisions that the testimony of either party to a suit may be taken on interrogatories, and, if he refuses to answer, the interrogatories shall be taken as confessed (Rev. St. art. 2239 *et seq.*), interrogatories propounded to plaintiff by a defendant corporation should be so taken as confessed, though there is no provision by which a corporation could be required to answer interrogatories.—GULF, C. & S. F. RY. CO. V. NELSON, Tex., 24 S. W. Rep. 588.

77. EASEMENTS — Right of Way.—A deed of all the merchantable coal in an opened mine under the grantor's land, with right of way on said land to carry the coal away, does not convey the right to take out of the pit on said land, and carry by such right of way, coal mined under another tract, nor to dump at the pit's mouth the refuse from the latter; nor can the grantee, having accepted such deed, assert a servitude on the land for such purposes by reason of the practice of the former common owner of both tracts.—VOGEL V. WEBBER, Penn., 28 Atl. Rep. 226.

78. EJECTMENT—Evidence.—In ejectment by a wife on a contract of purchase made by her husband with one deceased, receipts for payments from deceased and his executor to the husband, and one to the wife, not showing that they related to the same land or the land in dispute, are admissible as subject to parol explanation.—RAPLEY V. KLUGH, S. Car., 14 S. E. Rep. 680.

79. EQUITY—Jurisdiction.—Code 1886, § 3262, providing that the chancery court shall have concurrent jurisdiction with the Probate Court to sell for division or partition property held by joint owners or owners in common, does not give the chancery court jurisdiction of a suit for sale of land for partition, where a defendant holds possession adversely under a claim of title founded on disputed facts; neither court having jurisdiction of such action, independently of such statute.—SELLERS V. FRIEDMAN, Ala., 14 South. Rep. 277.

80. EQUITY—Relief against Mistake.—On dissolution of a partnership it appeared that plaintiff had withdrawn $10,000 more than defendant, and, instead of paying defendant $5,000, his share of the amount which plaintiff owed the firm, plaintiff by mistake gave him his note for $10,000, defendant also believing that he was entitled to that amount: Held, that a bill would lie for relief.—GOULD V. EMERSON, Mass., 35 N. E. Rep. 1065.

81. EVIDENCE — Memoranda.—Memoranda of securities deposited, made from time to time, but not contemporaneously with the deposits, and as to which the party making them swears that she cannot tell when she made them, or why she made or struck out any of them, and that they are not reliable, are not independent evidence of the character and value of the securities.—BATES V. PREBLE, U. S. S. C., 14 S. C. Rep. 277.

82. EXECUTION — Sale — Title.—The interest of the grantor in property transferred in fraud of creditors

cannot be sold on execution subject to the interest of the grantee, as it is a mere intangible equity.—STONEBRIDGE v. PERKINS, N. Y., 35 N. E. Rep. 980.

83. EXECUTION SALE—Allotment of Homestead.—The sale on execution of the interest in land of one entitled to a homestead, without allotment of homestead, when he had no homestead already allotted in other land, is void.—FERGUSON v. WRIGHT, N. Car., 18 S. E. Rep. 691.

84. EXECUTOR — Fees—Assignment.—An assignment by an executor of his fees before they are ascertained and fixed as provided by statute is against public policy, and void.—IN RE WORTHINGTON, N. Y., 35 N. E. Rep. 929.

85. EXPERT TESTIMONY — Opinion Evidence.—Witnesses are not shown to be competent to give an opinion as to the market value of land where they are shown merely to have "heard" of sales in the neighborhood, without stating how, where, or from whom, and do not profess to have a knowledge of what lands are generally held at for sale in the neighborhood.—MICHAEL v. CRESCENT PIPE-LINE CO., Penn., 28 Atl. Rep. 204.

86. FEDERAL AND STATE COURTS — Injunction.—A Federal Court has no authority, pending the determination of an appeal in condemnation proceedings in the State Courts, to preserve by injunction the *status quo* between two railroad companies in respect to a crossing by one under the tracks of the other, when the condemning company has paid into the State Court the assessed compensation, which, by the express terms of a State statute, whose constitutionality has been finally affirmed by the State Courts, gives it a right to immediately proceed with the work.—PENNSYLVANIA R. CO. v. NATIONAL DOCKS & N. J. J. C. RY. CO., U. S. C. C. (N. J.), 58 Fed. Rep. 929.

87. FEDERAL COURTS — Diverse Citizenship.—Where the jurisdiction of a United States Court has completely attached in ejectment against a tenant in possession by a citizen of another State, it is not affected by the substitution of the landlord for such tenant as defendant.—HARDENBERGH v. RAY, U. S. S. C., 14 S. C. Rep. 305.

88. FEDERAL COURTS—United States Commissioners.—For services rendered in good faith in criminal proceedings, in a case of actual arrest and hearing, the commissioner is entitled to a fee of $10, whether the accused was discharged or held for trial; and it is immaterial that the complaint was defective, if it was manifestly intended to charge an offense. If, however, there is no arrest, there can be no fee.—SOUTHWORTH v. UNITED STATES, U. S. S. C., 14 S. C. Rep. 274.

89. FEDERAL OFFENSE—Indictment.—It is not sufficient to charge a conspiracy to defraud the United States in the general language of Rev. St. § 5440.—IN RE BENSON, U. S. C. C. (Cal.), 58 Fed. Rep. 962.

90. FRAUDS, STATUTE OF—Parol Exchange of Land.—A parol contract for the exchange of land, which is established by clear and indubitable evidence, and executed by an exchange of possession pursuant thereto, is not within the statute of frauds.—BROWN v. BAILEY, Penn., 28 Atl. Rep. 245.

91. FRAUDS, STATUTE OF—Pleading.—The statute of frauds, to be available as a defense, must be especially pleaded.—LAGERFELT v. MCKIE, Ala., 14 South. Rep. 281.

92. FRAUDULENT CONVEYANCES—Deed.—That a conveyance in honest payment of a real debt is brought about by the action of other creditors in pressing their claims does not make it fraudulent.—MCALLISTER v. HONEA, Miss., 14 South. Rep. 264.

93. FRAUDULENT CONVEYANCES — Possession—Conditional Sale.—The seller of a chattel on condition cannot prevail against a creditor of the purchaser, where the purchaser has held possession of the chattel for over three years, and the seller has no record evidence of his right.—JENNINGS v. WILSON, Miss., 14 South. Rep.

94. FRAUDULENT CONVEYANCE—Trust Deed.—Where the managing member of an insolvent firm executes a trust deed of all the firm's property to secure part of the firm's creditors, and also to secure his individual creditor to an amount four times greater than the combined debts of such other beneficiaries, such deed is fraudulent and void as to the unsecured creditors of the firm.—WM. W. KENDALL BOOT & SHOE CO. v. JOHNSTON, Tex., 24 S. W. Rep. 583.

95. FRAUDULENT TRUST — Creditors of Trustee.—Though a will, in terms, declares a devise of a life estate to testator's husband to be "in trust," yet where no trust is specified, and the absolute control of the entire income is vested in the husband to use and dispose of as he may see fit, without liability to account to any one, he must be deemed the absolute owner of the income as long as he lives; and a further provision in the will, exempting the income from liability for any of his debts, present or future, is void, as being an attempt to free the absolute owner of an estate from the claims of his creditors.—HAHN v. HUTCHISON, Pa., 28 Atl. Rep. 167.

96. GUARANTY—Contribution.—Under Rev. St. § 2600, abolishing the distinction between actions at law and suits in equity, in an action in the nature of implied *assumpsit* by a guarantor for contribution there obtains the equitable doctrine allowing a surety, who has paid the whole debt, to recover against his cosureties, who are solvent and reside in the State, the same contribution as though they were the only sureties bond.—FAUROT v. GATES, Wis., 57 N. W. Rep. 294.

97. GUARDIAN AND WARD—Insane Person.—Under the laws of Ohio, which authorize a guardian of an insane person to sell personal property without an order of court, "when for the interest of the ward," such guardian has no authority to assign the ward's part interest in a chose in action then in course of litigation by the other part owner, in consideration of the assignee's promise to pay all costs and expenses of such litigation, it appearing that the guardian has been made a defendant therein because he refused to join as plaintiff, for as the guardian would not be liable to costs, and would be entitled to share in any recovery, the assignment is without any consideration and against interest of ward.—HOLLEN v. SCUDDER, U. S. C. C. (Mo.), 58 Fed. Rep. 952.

98. HOMESTEAD—Abandonment.—J owned a quarter section of land, which he occupied as a homestead with some of his children for a number of years. Plaintiff was his wife. After all of his children had left the land, J alone executed a deed for it to defendant, and then abandoned his homestead. Plaintiff, who had never before been in Kansas, soon after joined her husband, and after his death took possession of the land, and brought this suit to set aside the deed. The trial court made a general finding for the defendant, and rendered judgment thereon in his favor. This judgment is upheld.—JENKINS v. HENRY, Kan., 35 Pac. Rep. 216.

99. HOMESTEAD — Abandonment. — Where plaintiffs rented, for a few months, their city home, which they had occupied a number of years as a homestead, and went to live on a ranch, but with no intention of abandoning their city home, to which they soon returned, such temporary lease did not constitute an abandonment.—HINES v. NELSON, Tex., 24 S. W. Rep. 542.

100. HOMICIDE.—In a homicide case, there being no controversy as to the cause of death, the killing by defendant is sufficiently proven by evidence that defend ant shot at deceased, who immediately fell, and in a few minutes died; that defendant, on being asked if he killed deceased, said he didn't know, and pointed at the body; and that there was fresh blood on deceased's clothes, over his breast.—STATE v. MOODY, Wash., 35 Pac. Rep. 132.

101. HUSBAND AND WIFE—Community and Separate Property.—As against an attacking creditor of the husband the wife is not precluded from proving that land conveyed to her during coverture, not specifically

described as her separate estate, is separate, and not community, property.—SINSHEIMER v. KAFN, Tex., 24 S. W. Rep. 533.

102. HUSBAND AND WIFE—Wife's Separate Estate.—The separate estate in Tennessee being equitable, a wife owning an estate devised to her sole and separate use without restriction of her power to alienate may, on becoming surety for another's debt, by express words charge the estate with such debt.—WEBSTER v. HELM, Tenn., 24 S. W. Rep. 488.

103. HOMESTEAD OF WIFE AND HER CHILDREN.—Code Civil Proc. § 1468, provides that, if deceased left also a minor child or children, one-half the real estate of which deceased died seised shall "belong" to his widow, and the remainder to the child or children. Section 1,485 provides that persons succeeding to the title of "successors to homesteads" have all the rights of the persons whose interests they acquire: Held, that a wife, having minor children by a former, deceased husband, could convey to her second husband a certain 60 acres of 175 acres of land which were set apart to her and her children as a homestead out of the lands of her deceased husband.—MCHARRY v. STEWART, Cal., 35 Pac. Rep. 141.

104. INFANCY — Contracts — Ratification.—An infant who purchases land, and gives his monthly installment notes for the price, may, on becoming of age, rescind the contract, and recover what he has paid thereon.—RAPID TRANSIT LAND CO. v. SANFORD, Tex., 24 S. W. Rep. 587.

105. INFANTS—Ratification.—Where an infant takes a deed, and gives back a purchase money mortgage, and the property is sold under judgment on *scire facias* on the mortgage, the infant, by bringing ejectment against the purchaser, not only affirms the deed, but the mortgage.—KENNEDY v. BAKER, Penn., 28 Atl. Rep. 252.

106. INJUNCTION — Contempt.—In an action for injunction, commanding defendant not to interfere with plaintiff in connecting with defendant's water conduit, which right plaintiff claimed under a contract, there was judgment for plaintiff, but defendant appealed, and gave bond. Plaintiff had had no connection with the conduit, except pending a temporary injunction, which had been dissolved: Held, that the appeal stayed the operation of the judgment, so that defendant was not in contempt for preventing the connection.—STEWART v. SUPERIOR COURT, Cal., 35 Pac. Rep. 156.

107. INJUNCTION—Damages.—After defendant in a suit for an injunction has filed a motion to dissolve the preliminary writ, plaintiff cannot, *ex mero motu*, dismiss the action, without first permitting defendant to establish the damage sustained by him as the result of the bringing of the action.—CANADIAN & A. MORTGAGE & TRUST CO. v. FITZPATRICK, Miss., 14 South. Rep. 270.

108. INSURANCE — Falling Buildings.—Under a fire policy providing that if the building fall, except as the result of fire, insurance shall immediately cease, insurance cannot be recovered, where fire breaks out as the result of the fall of the building.—NICHOLLS v. SUN MUT. INS. CO., Miss., 14 South. Rep. 263.

109. INSURANCE—Reinsurance — Contract. — A simple contract of reinsurance between insurance companies is a contract of indemnity, in which the insurer reinsures risks in another company, and is solely for the benefit of the latter, and not of the policy holders.—BARNES v. HEKLA FIRE INS. CO., Minn., 57 N. W. Rep. 314.

110. INSURANCE POLICY—Conditions.—Where a policy on a manufacturing establishment is renewed at the request of the assignees for benefit of the assured's creditors, many days after the operation of the machinery ceased, but while the premises are occupied by the foreman, who is engaged in putting together and selling engines and other articles belonging to the assigned estate, and a loss occurs during such condition of affairs, the establishment has not ceased to be operated within the meaning of the policy.—BOLE v. NEW HAMPSHIRE FIRE INS. CO., Penn., 28 Atl. Rep. 205.

111. INTOXICATING LIQUORS—Judgment.—In a criminal case, the court may permit the plea of guilty to be withdrawn, and another plea to be entered in its place, in the exercise of a sound discretion, if justice and a fair trial on the merits require it; but it must be in time and the reason for it must be made to appear clearly and distinctly.—STATE v. SHANLEY, W. Va., 18 S. E. Rep. 734.

112. JUDGMENTS—Irregular Entry. — A judgment will not be vacated for irregularity in entry, because of an alleged agreement between plaintiff and the moving party, by which the latter was not to be personally liable for the debt which was the foundation of the judgment, where there was a preponderance of evidence that no such agreement had been made. — TACOMA LUMBER & MANUF'G CO. v. WOLFF, Wash., 35 Pac. Rep. 115.

113. JUDGMENT—Revival.—A husband deeded land to his wife, subject to the lien of a judgment against him. The judgment was twice revived against him, but neither time against her or her devisee, as terre-tenant: Held, that the purchaser at a sheriff's sale under a *fi. fa.* issued on such revived judgment, and levied on the land, acquired no title.—LONG v. MILLER, Penn., 28 Atl. Rep. 233.

114. JUDGMENT — Foreclosure Sale — Time — Setting Aside Sale.—The date of a foreclosure judgment, from which the year must elapse before sale, is the date when, the costs being taxed and entered therein, the judgment is signed, dated, and filed, though it be not till later extended on the record. — MEEHAN v. BLODGETT, Wis., 57 N. W. Rep. 291.

115. JUSTICE OF THE PEACE—Erroneous Judgment.—A purported judgment of a justice of the peace, which, upon its face, appears to have been rendered and docketed after the expiration of the period of time fixed by Gen. St. 1878, ch. 65, § 68, within which a justice must render and enter judgment, is absolutely void and such justice will not be liable in a civil action for damages because of such rendition and entry, no further proceedings on his part being shown.—MURRAY v. MILLS, Minn., 57 N. W. Rep. 324.

116. LANDLORD AND TENANT—Construction of Lease.—Lessor demised land to lessee for drilling or operating for oil or gas for three years, or as long as such products should be found in paying quantities; it being stipulated that lessee begin work within sixty days, and complete one well within three months thereafter, and otherwise pay a fixed rental until completion of one well, and that failure to perform the contract or its conditions annul the lease, lessee "having the option to drill the well or not, or pay said rental or not, as he may elect:" Held, that the lessee must dig a well, or pay the rent.— MCMILLAN v. PHILADELPHIA CO., Penn., 28 Atl. Rep. 220.

117. LANDLORD AND TENANT— Denial of Landlord's Title.—In an action by a landlord against his tenant, whether the action be debt, assumpsit, covenant, or unlawful detainer, where neither fraud or mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord.—VOSS v. KING, W. Va., 18 S. E. Rep. 762.

118. LANDLORD AND TENANT — Surrender of Lease.—Acts on the part of a tenant indicative of an intent to abandon leased premises, and on the part of a landlord to resume possession must, to bind the parties, and to amount to a surrender by operation of law, be notorious, and sufficient to operate by way of estoppel.—STERN v. THAYER, Minn., 57 N. W. Rep. 329.

119. LIFE INSURANCE — Application — Warranties. — When the statements in the application are made part of the policy, and declared to be warranties, it is a good defense to show that they were untrue, without further showing that the applicant knew or believed them to be untrue.—PROVIDENT SAV. LIFE ASSUR. SO€.

OF NEW YORK v. LLEWELLYN, U. S. C. C. of App., 5 Fed. Rep. 940.

120. LOST DEEDS—Evidence.—Where, in an action to recover land, defendant claims that plaintiff's interest was conveyed to defendant's grantor, but that the deed has been lost, defendant cannot give secondary evidence of such conveyance, on mere hearsay evidence that the probable custodians of the deed could not find it.—MASTERSON v. JORDAN, Tex., 24 S. W. Rep. 549.

121. MALICIOUS PROSECUTION—Evidence.—In an action for malicious prosecution it is not competent for defendants to prove that in instituting the prosecution they acted on the advice of an alderman or justice of the peace.—BEIHOFER v. LOEFFERT, Penn., 28 Atl. Rep. 216.

122. MALPRACTICE.—Error cannot be predicated of an instruction requiring a physician, in determining whether a patient has sufficiently recovered to require no further medical or surgical attention, to exercise reasonable or ordinary care and skill, and to have regard to and take into account the well-settled rules and principles of medical and surgical science.—MUCCI v. HOUGHTON, Iowa, 57 N. W. Rep. 305.

123. MANDAMUS—Accounting.—Where it appears from the alternative writ of *mandamus* that a long and complicated accounting must precede a final disposition of the case, the court will not attempt by *mandamus*, to determine the rights of the parties.—BOARD OF EDUCATION OF CITY OF CALDWELL v. SPENCER, Kan., 35 Pac. Rep. 221.

124. MARRIED WOMAN—Insanity.—The real estate of an insane married woman during her coverture and insanity can be charged with indebtedness only to the same extent as if she were not insane, and neither her committee nor a court of equity can subject the *corpus* of such real estate to debts or claims with which it would not be chargeable if she were sane.—DICKEL v. SMITH, W. Va., 18 S. E. Rep. 721.

125. MARRIED WOMAN—Deeds — Acknowledgment.—When a wife has sold land for an adequate cash price, given possession, and, with her husband signed a deed, a judgment thereafter taken against her is no lien on the land, if later, she and her husband acknowledged the deed, since only she, not her creditor, can repudiate her contract.—MEADE v. CLARK, Penn., 28 Atl. Rep. 214.

126. MARRIED WOMAN—Separate Estate.—The statute has removed the common-law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made upon the faith and credit thereof, and with intent, on her part, to thereby bind her separate property.—GODFREY v. MEGAHAN, Neb., 57 N. W. Rep. 284.

127. MARRIED WOMAN—Separate Property.—Property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use by her, although when purchased by her she had no separate estate.—STEWART v. STOUT, W. Va., 18 S. E. Rep. 726.

128. MASTER AND SERVANT.—Where, in an action for wages, there is no evidence to support defendant's counterclaim for damages, arising out of plaintiff's breach of the contract of employment, for future services, and it appears that the amount sued for was due plaintiff when he left defendant's, employ a verdict for that amount was properly directed.—HASSELMAN PRINTING CO. v. FRY, Ind., 35 N. E. Rep. 1045.

129. MASTER AND SERVANT—Defective Appliances.—A boy of 16, with little experience of freight elevators, and having operated that in question only 4 days, when injured by catching hold of the cable in mistake for the neighboring check rope cannot, as a matter of law, be charged with negligence, nor with having assumed the risk consequent on his employer's breach of the statute in failing to guard the cable and its drum, placed close to the passageway of the elevator.—THOMPSON v. JOHNSTON BROS. CO., Wis., 57 N. W. Rep. 298.

130. MASTER AND SERVANT—Fellow-servants.—Though a steamboat engineer has power to employ and discharge an oiler working under him, they are fellow-servants, under Civil Code, § 1970, providing that those are fellow-servants who are employed by the same master in the same general business.—STEVENS v. SAN FRANCISCO & N. P. R. CO., Cal., 35 Pac. Rep. 165.

131. MASTER AND SERVANT—Fellow-Servants.—A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the vice-principal of the corporation, for whose negligence it is responsible to subordinate servants.—HANEY v. PITTSBURGH, C. & ST. L. RY. CO., W. Va., 18 S. E. Rep. 748.

132. MASTER AND SERVANT—Malicious Misconduct.—A railroad company is not liable to a trespasser on its trains for personal injuries caused by the willful and malicious misconduct of its servant, unless the act complained of was done in the discharge of the servant's duty, and within the line of his employment.—ALABAMA G. S. R. CO. v. HARRIS, Miss., 14 South. Rep. 263.

133. MASTER AND SERVANT—Negligence of Master.—In an action against a railroad company for injury through the negligence of an engineer, an instruction that the company could act only through agents, and that the negligence of an agent is the negligence of the company, does not authorize a recovery for the negligence of a fellow-servant, when followed by the statement that the company would not be liable for the negligence of the engineer if it had used ordinary care in employing him.—MEXICAN NAT. R. CO. v. MUSSETTE, Tex., 24 S. W. Rep. 520.

134. MASTER AND SERVANT—Torts of Servant.—Where a railroad company gives an employee general authority, actual or apparent, to act for it in the capacity of a detective officer, and such authority includes, expressly or by general usage and consent, the power to make an arrest in its behalf, it will be liable for a wrongful arrest made by him without a warrant, though it does not expressly authorize an arrest without a warrant.—DUGGAN v. BALTIMORE & O. R. CO., Pa., 28 Atl. Rep. 182.

135. MASTER AND SERVANT—Vice-principals.—When a master delegates to a superintendent full power to manage the business, and employ and discharge servants, without interference, he does not become a fellow-servant of a servant in charge of a machine by helping with it, but is a vice-principal in whatever he does in furtherance of the business.—SHUMWAY v. WALWORTH & N. MANUF'G CO., Mich., 57 N. W. Rep. 251.

136. MECHANICS' LIENS—Parties.—In an action to enforce a mechanic's lien against property of H, the mere allegation that C claims some interest in the property is not sufficient to make the insolvent estate of H, of which C was assignee, a party.—QUINBY v. SLIPPER, Wash., 36 Pac. Rep. 116.

137. MECHANICS' LIENS—Pleading.—Under Code Civil Proc. § 1195, providing that in actions to enforce mechanics' liens the court must allow as part of the costs the money paid for filing and recording the lien, and reasonable attorney's fees, averment of the amount thereof in the complaint is not necessary.—MULCAHY v. BUCKLEY, Cal., 35 Pac. Rep. 144.

138. MORTGAGES—Debts Secured.—A mortgage to secure the mortgagee "for all indorsements heretofore made, or that may be hereafter made, by him, for the benefit" of the mortgagor, does not secure a liability of the mortgagor to the mortgagee arising from the payment by the latter of an outstanding note of the former not indorsed by him.—BURT v. GAMBLE, Mich., 57 N. W. Rep. 261.

139. MORTGAGES — Foreclosure.—Where a receiver was appointed in a suit to foreclose a mortgage, and the mortgagee purchased the mortgaged premises at

the foreclosure sale for the full amount of his debt and costs, the rents and profits of the mortgaged premises in the hands of the receiver at the time of the sale belonged to the mortgagor, and not to the mortgagee.—PACIFIC MUT. LIFE INS. CO. v. BECK, Cal., 35 Pac. Rep. 169.

140. MORTGAGE — Payment—Cancellation.—A mortgagee delivered to plaintiff, without indorsement, a mortgage note, as collateral security for a debt. The mortgagor paid the mortgage to, and procured its cancellation by, the mortgagee, without notice of the transfer of such note, and sold the mortgaged premises to her co-defendant, which purchased in good faith, the mortgagee representing that he was the owner of such note, and that it was temporarily mislaid: Held, that plaintiff could not subject such premises to the payment of such note.—VANN v. MARBURY, Ala., 14 South. Rep. 278.

141. MORTGAGE—Record.—An unrecorded mortgage, being valid between the parties and those having notice (Civil Code, § 1,217), and being declared void, by section 1,214, only as against subsequent purchasers or mortgagees for value and in good faith, takes precedence over an attachment or judgment lien obtained after execution of the mortgage.—BANK OF UKIAH v. PETALUMA SAV. BANK, Cal., 35 Pac. Rep. 170.

142. MORTGAGE — Subrogation.—A widow who has bought a lien on her husband's land and has had it established as superior to a mortgage, cannot resist the mortgagee's right of subrogation to the first lien of a tax judgment which he has taken up, on the ground that the mortgage was made for more than the actual debt, in fraud of her husband's creditors.—ROEDER v. KELLER, Ind., 35 N. E. Rep. 1014.

143. MUNICIPAL CORPORATIONS — Defective Drains — Pleading.—A complaint which alleges that defendant city negligently failed to keep its drain in repair, and allowed it to become obstructed; that the flow of water thereby became greatly impeded; and that the water flowed into plaintiff's cellar, keeping it damp and unhealthful, and injuring personal property of plaintiff,—states a good cause of action.—CITY OF VALPARAISO v. CARTWRIGHT, Ind., 35 N. E. Rep. 1051.

144. MUNICIPAL CORPORATION—Defective Sidewalks.—A woman walking before daylight tried to cross a driveway in the sidewalk where ice had formed, fell, and was hurt. She testified, on cross-examination, that she saw the ice, and took her risk in crossing, but did not think she should fall. At her request the court charged that if she saw the ice before crossing, but did not fully comprehend the danger because it was dark, or otherwise, she might still recover; adding, of its own accord, that, if a reasonably intelligent person could not have understood the danger, then her knowledge of it was not in law negligence, but was to be considered with other facts to determine whether a reasonably intelligent and prudent person would have stepped on the ice, and that, if such a person would not have done so, then she could not recover: Held, that the qualification was pertinent, and the standard of care correctly defined. — MCGUINNESS v. CITY OF WORCESTER, Mass., 35 N. E. Rep. 1068.

145. MUNICIPAL CORPORATIONS—Public Improvements.—Plaintiff owned the river front on both sides of the terminus of a bridge connecting B street with a street on the other side of the river, and constructed a mill race between the dock line and the original river bed. On the outside bank of the canal he erected a building, to which there was access for foot travelers from the bridge: Held, that the property is assessable for improvement of B street, though it does not abut on the street.—POWERS v. CITY OF GRAND RAPIDS, Mich., 57 N. W. Rep. 250.

146. MUNICIPAL CORPORATIONS—Railroad in Street.—Where a city ordinance, accepted by a railroad company authorizing it to construct its road upon the streets, provides that it shall pay to any person or property owner "all" damages they may sustain, and that it shall indemnify the city for any liability direct or remote, it may incur from the granting of the right of way, the damages recoverable by a property owner are only those fixed by the established rules of law, and do not include remote and speculative damages.—HENDERSON BELT R. CO. v. DECHAMP, Ky., 24 S. W. Rep. 605.

147. MUNICIPAL CORPORATION — Street Railroads.—Under Const. art. 17, § 9, providing that no street passenger railway shall be constructed within the limits of any city without the consent of such city, a city, as a condition to the grant of franchise to a street railway company, may impose a tax on the dividends to be earned, and fix the maximum rate of fare to be charged, by the company.—CITY OF ALLEGHENEY v. MILLVALE, E. & S. ST. RY. CO., Penn., 28 Atl. Rep. 202.

148. MUNICIPAL OFFICERS—Reviewing Election Contests.—*Certiorari*, and not *mandamus*, is the proper remedy to review the proceedings of a municipal council, under section 28 of chapter 47 of the Code.—STATE v. MCALLISTER, W. Va., 18 S. E. Rep. 770.

149. MUNICIPAL BONDS — Validity — Negotiability.—Statutory power to issue "bonds" for loans lawfully made (How. Ann. St. Mich. § 2,717) includes power to make the bonds negotiable.—CITY OF CADILLAC v. WOONSOCKET INST. FOR SAVINGS, U. S. C. C. of App., 58 Fed. Rep. 935.

150. MUNICIPAL OFFICERS.—It is the policy of the law to require of municipal corporations a strict observance of their powers.—STATE v. CITY OF NEW ORLEANS, La., 14 South. Rep. 291.

151. NEGLIGENCE—Evidence.—Where a trespasser on a railroad bridge is run into, the facts that the view from that point was unobstructed for 150 yards, that the train might have been stopped within 80 to 150 feet, and that the fireman was looking out of the engine along the track towards the trespasser do not show wanton and reckless negligence, as, if the fireman did not see him, it would be but simple negligence.—GEORGIA PAC. R. CO. v. ROSS, Ala., 14 South. Rep. 282.

152. NEGLIGFNCE— Injury to Licensee.— A railroad company has a platform and mail crane near a post-office at which the mail train does not stop, but the postal clerk from the mail car, with a "catcher," takes in from the crane the mail pouch suspended thereon, without the train slacking speed. A person who stations himself on the company's land, near the mail crane, for the purpose of witnessing the catch, or for some other purpose of like kind, as a mere voluntary licensee, is subject to the concomitant risk and danger of injury thus assumed, and the company does not owe him the duty of keeping the mail crane in suitable and safe condition.- POLING v. OHIO RIVER R. CO., W. Va,, 18 S. E. Rep. 782.

153. NEGLIGENCE — Pleading.—A complaint sufficiently alleged the negligence of defendant, when it stated that he left the body of his dead cow in a public highway, and that, while plaintiff was exercising proper care in attempting to drive past the body, his horses were frightened thereat, and ran away and injured him.—HINDMAN v. TIMME, Ind., 35 N. E. Rep. 1046.

154. NEGOTIABLE INSTRUMENTS.—The plaintiff being in the possession of a negotiable note, properly indorsed, it will be presumed that he owns and acquired the note in good faith for full value in the usual course of business before maturity, without notice of any circumstance that would impeach its validity; and where the defendant, who is the maker of the note, claims that the plaintiff does not so hold it, it devolves upon him to prove his claim.—FIRST NAT. BANK OF COBLESKILL v. EMMETT, Kan., 35 Pac. Rep. 213.

155. NEGOTIABLE INSTRUMENTS—Assignment.—A note payable to order of the maker, and by him indorsed and delivered, is, like a note expressly payable to bearer, not subject to the statute allowing defenses existing between the original parties against a *bona fide* holder.—BANK OF WINONA v. WOFFORD, Miss., 14 South. Rep. 262.

156. NEGOTIABLE INSTRUMENT—Burden of Proof.—In an action on a note, by an indorsee against the maker, evidence that the note was executed without consideration, or that it had been partially paid before its indorsement, does not cast on the indorsee the burden of proving that he is a *bona fide* holder, but the burden is on the maker to disprove this fact.—LITTLE v. MILLS, Mich., 57 N. W. Rep. 267.

157. NEGOTIABLE INSTRUMENTS — Forged Check.—Where a bank paid a forged check drawn on it, entered it on its books, and then apparently dismissed it from further attention, and the forgery was not discovered until five days afterwards, through an investigation started by another bank, from which it received it, the former bank is guilty of negligence, and cannot recover from the latter the amount so paid.—IRON CITY NAT. BANK OF PITTSBURGH v. FORTPITT. NAT. BANK OF PITTSBURGH, Penn., 28 Atl. Rep. 196.

158. NEGOTIABLE INSTRUMENT—Pleading — Answer.—In an action on a note, by the indorsee against the payee and joint makers, where the complaint does not allege that plaintiff purchased the note before maturity, an answer of one of the joint makers, alleging that he was induced to sign the note by fraudulent conspiracy of his comaker and the payee, constitutes a good defense, since plaintiff's failure to aver a purchase before maturity relieved such joint maker of the necessity of alleging notice. — CAMPBELL v. PATTON, N. Car., 18 S. E. Rep. 687.

159. NEGOTIABLE INSTRUMENT—Surety—Consideration.—Where defendant signed as surety, after its delivery, a note given for machinery, which note was executed and delivered at the time of the delivery of the machinery, without any agreement that defendant's name would be secured to the note, and the machinery had been put up in running order when defendant signed, and the consideration fully executed, there was no consideration for his signature.—SIMMANG v. FARNSWORTH, Tex., 24 S. W. Rep. 541.

160. NEGOTIABLE INSTRUMENT—Transfer.—A note may be transferred by delivery and without indorsement (Code, § 177), and, though such transfer does not pass the legal title according to the law merchant, the transferee is the equitable assignee thereof.—JENKINS v. WILKINSON, N. Car., 18 S. E. Rep. 696.

161. NUISANCE—Bridge over Street.—The erection, by a railroad company, of a bridge on a street, under decree of court permitting it, is legal, and such structure is not a nuisance. — CASS v. PENNSYLVANIA CO., Penn., 28 Atl. Rep. 161.

162. NUISANCE — Liability of Landlord. — D leased premises to C for three years, with an option to renew for two years. Before the expiration of the three years, C assigned the lease to W, and D sold the premises to defendant. W sublet the premises to tenants, who used them in such manner as to injure plaintiff's property. Defendant sued W for possession, and compromised with W by executing a new lease: Held, a surrender of the old lease, which gave defendant a right of entry, and that defendant was liable to plaintiff for injuries resulting from a maintenance of the nuisance after the execution of the new lease. — FLEISHNER v. CITIZENS' REAL-ESTATE & INV. CO., Oreg., 35 Pac. Rep. 174.

163. NUISANCE—Liabilities of Mortgagee.—A contract between mortgagor and mortgagee construed, and held to put the mortgagee in possession of the mortgaged premises, so that the latter became "mortgagee in possession," and so that it might, after notice, be liable as the continuer of a nuisance on the premises created by the mortgagor.—FERMAN v. LOMBARD INVESTMENT CO., Minn., 57 N. W. Rep. 309.

164. OFFICE—De Facto.—Where a person has been declared elected to an office by the proper canvassing board, and has received his certificate of election and duly qualified, he is entitled to the possession of such office when his term begins, as against every one except a *de facto* officer, in possession of it under color of authority.—STATE v. OATES, Wis., 57 N. W. Rep. 296.

165. OFFICE — County Treasurer — Vacation.—Under Pol. Code, § 996, providing that an office shall become vacant before the expiration of the term on the incumbent's absence from the State, without permission of the legislature, beyond the period allowed by law; and section 4120, forbidding a county officer to absent himself from the State for more that 60 days, or for any period, without the consent of the board of supervisors,—such absence, *ipso facto*, creates a vacancy in his office, and in the office of each of his deputies, and the appointing board may appoint another to fill the office.—PEOPLE v. SHORB, Cal., 35 Pac. Rep. 163.

166. PARTNERSHIP.—A partnership agreement between S and L provided that all checks be signed by both parties, and the agreement was communicated to their bank. All checks were drawn according to the agreement to within four months of the dissolution of the firm, and at that time S drew a number of checks, executed by himself alone, for purposes not entered on the books, nor known or consented to by L: Held that, as between the bank and an attaching creditor of the firm, the bank was entitled to credit for money paid out on the checks drawn by S only so far as it could show that the money was used to pay firm obligations.—GRANBY MINING & SMELTING CO. v. LAVERTY, Pa., 28 Atl. Rep. 207.

167. PARTNERSHIP—Deed in Trust.—A deed for the benefit of partnership creditors is not void because executed by one partner only, where such partner was sole manager of the firm business, and the other partners were absent.—KELLER v. SELF, Tex., 24 S. W. Rep. 578.

168. PARTNERSHIP —Dissolution.—A bank to which a draft against a firm is sent for collection cannot bind the drawers by taking the acceptance of only one of the partners; and the taking of such acceptance does not release the other partner from liability for the firm debt to the drawers, though the bank had knowledge that the firm had been dissolved, and that the accepting partner had assumed firm debts.—TOOTLE v. COOK, Colo., 35 Pac. Rep. 193.

169. PARTNERSHIP—Mortgage— Evidence.—In an action by a chattel mortgagee for damages for the conversion of the mortgaged goods under an attachment by a creditor of the mortgaging partnership, the creditor pleaded that the mortgage was executed to hinder creditors, at a time when the partnership was insolvent: Held, that evidence relating to the financial condition of the partnership was admissible.—JOHNSTON v. STANDARD SHOE CO., Tex., 24 S. W. Rep. 580.

170. PARTNERSHIP—Note of Partner.—Where a partner having general management of the business and sole control of the finances, with authority to contract for the firm in his own name, in the absence of firm funds advances money of his own, taking the firm's checks therefor, and then discounts a note executed in his own name, and takes the proceeds, turning into the firm its checks to the amount thereof, the money from the note goes into the business, so that the firm is liable on the note.—MICHIGAN SAV. BANK v. BUTLER'S ESTATE, Mich., 57 N. W. Rep. 253.

171. PARTNERSHIP— Retiring Partner—Notice.—Partners of a banking firm, who sell their interest and withdraw from the firm, cannot, by a mere publication of notice of such withdrawal in a newspaper, relieve themselves from liability for subsequent deposits by one who was a regular depositor for many years prior to such withdrawal; but a partner who gave actual personal notice to such depositor of his withdrawal, within three months thereafter, is not liable for such subsequent indebtedness.—ROBINSON v. FLOYD, Penn., 28 Atl. Rep. 258.

172. PARTNERSHIP — Sales.—Where a member of a partnership sells goods of the firm, the firm may bring suit for the price, though the purchaser thought he was dealing with such member as an individual.—GILBERT v. LICHTENBERG, Mich., 57 N. W. Rep. 259.

173. PARTNERSHIP—What Constitutes.— Each of two firms bought an undivided one-half of certain leases of

land on which an oil well had been drilled, and prepared the well for pumping, each paying one-half of the expense. When the first well was put in order, they drilled another well, and divided the expense incurred. The oil was run into pipe lines serving the district, and one-half of it was credited to each firm: Held, not to show a partnership.—BUTLER SAV. BANK v. OSBORNE, Penn., 28 Atl. Rep. 163.

174. PAYMENT—Evidence.—Where payment is made by check, which recites on its face, "in full of all demands," such words will constitute a receipt in full, as against the payee, only when it is shown that he had knowledge of the presence of such words, or facts are shown which in law would charge him with such knowledge.—RAPP v. GIDDINGS, S. Dak., 57 N. W. Rep. 237.

175. PUBLIC LANDS — Railroad Grants.—Courts are without jurisdiction to declare the rights of parties to certain real estate while the title to such real estate remains in the United States, and a contest is pending in the interior department between one of the parties litigant and the grantor of the other to test their claims to the land. Until the title passes from the United States, exclusive jurisdiction to determine the rights of adverse claimants to such land rests in that department of government charged by law with the disposal of the public lands.—GRANDIN v. LA BAR, N. Dak., 57 N. W. Rep. 241.

176. RAILROAD COMPANY.—A company chartered to build a road, "with power to construct such branches as the directors may deem necessary, and to connect" them with any railroads built or to be built, has a continuing power of branch building, not to be abridged by a subsequent act giving the company a certain time to complete its road, "with one or more tracks, sidings, depots, and appurtenances.—PITTSBURGH, V. & C. RY. CO. v. PITTSBURGH, C. & S. L. R. CO., Penn., 28 Atl. Rep. 155.

177. RAILROAD COMPANIES— Construction of Road—Highway.—A charter authorizing a railroad company to lay out a railroad between certain termini, and to construct "other branches," does not authorize it to so construct its road as to destroy a public highway, since an intention of the legislature to grant a power to take land, already appropriated to another public use must be shown by express words or necessary implication. — LOUISVILLE & N. R. CO. v. WHITLEY COUNTY COURT, Ky., 24 S. W. Rep. 604.

178. RAILROAD COMPANY— Donation— Evidence.— In an action on a donation for the construction of a railroad, it appeared that defendant agreed in writing to take a number of shares of stock in plaintiff company; that subsequently, at plaintiff's solicitation, defendant consented to make his subscription a donation; and that the only evidence in writing of this subsequent agreement was the word "donation," written opposite defendant's name in the original agreement: Held, that parol evidence was competent to show that plaintiff's promise to locate its line along a certain route was the consideration for the donation.— LAKE MANAWA CO. v. SQUIRE, Iowa, 57 N. W. Rep. 307.

179. RAILROAD COMPANIES — Fires — Constitutional Law.—Rev. St. 1889, § 2615, making a railroad company liable in damages for fires communicated by its locomotives, is not unconstitutional as impairing, by subjecting it to an increased burden, the rights given it by its previously granted charter to propel its cars by steam.—MATHEWS v. ST. LOUIS & S. F. RY. CO., Mo., 24 S. W. Rep. 591.

180. RAILROAD COMPANIES — Injury to Trespasser. — Where a railroad company has not given its conductor express authority to employ help, nor clothed him with apparent authority, and there is no exigency requiring extra help, a boy of 15, who willingly obeys his request to assist on a car, is a trespasser, and, if injured, cannot recover from the company, in the absence of willful or gross negligence.—HOT SPRINGS R. CO., v. DIAL, Ark., 24 S. W. Rep. 500.

181. RAILROAD COMPANIES — Signals at Crossings.—Section 3336, Rev. St., requires the engineer having in charge an engine in motion to ring the bell and sound the whistle on approaching a place where the road crosses any highway or traveled place, by a bridge or other structure.— TOLEDO & O. C. RY. CO. v. JUMP, Ohio, 35 N. E. Rep. 1054.

182. RAILROAD COMPANIES—Statutory Regulations.—Elliott's Supp. §§ 1088, 1089, requiring railroad companies to have written on a blackboard, 20 minutes before the schedule time for the arrival of a train at a depot, a statement whether the train is on time or not, and "if late, how much," does not apply to a company operating a line, the regular time of passage from one terminus of which to the other is less than 20 minutes. STATE v. KENTUCKY & I. BRIDGE CO., Ind., 35 N. E. Rep. 991.

183. RAILROAD COMPANIES — Taxation. — A bridge owned by a railroad company on its line of road is properly returned for taxation as so much mileage of railroad, and cannot be again taxed as a bridge.—SCHMIDT v. GALVESTON, H. & S. A. R. CO., Tex., 24 S. W. Rep. 547.

184. RAILROAD CROSSING—Contributory Negligence.—Where a city grants to a railroad company the right to construct its tracks along a public, unimproved street, and the company erects an embankment in the street, and lays its tracks thereon, a person walking along the track is neither a trespasser nor a licensee, so as to be there at his own peril, since the grant to the company does not oust the rights of the public in the street.—PITTSBURG C. C. & ST. L. RY. CO. v. BENNETT, Ind., 35 N. E. Rep. 1033.

185. REAL ESTATE AGENT—Contracts.—In consideration of plaintiffs advertising defendant's property, defendant agreed to pay them a certain commission in case the property should be sold within a specified time, either by reason of the advertisement or otherwise: Held, that any disposition of the property within the specified time rendered defendant liable for the commission.—COOK v. BLAKE, Mich., 57 N. W. Rep. 249.

186. RECORD—Bona Fide Purchaser.—An unrecorded map showed block 55 in Tucker's addition to cover certain lots, but another unrecorded map indicated that the lots were outside the block. The owner of the addition, displaying the first map, sold the block. the deed did not give the metes and bounds or refer to the map, but purported to convey "block 55, in Tuckers addition:" Held, that the record of such deed was not constructive notice to a subsequent purchaser, who, having no notice of the first map, bought said lots by reference to the second map.—GULF, C. & S. F. RY. CO. v. GILL, Tex., 24 S. W. Rep. 502.

187. RELIGIOUS SOCIETIES — Constitutional Amendments.—When the constitution empowers the general conference to make and repeal rules of discipline, but not "to change or do away with the confession of faith, as it now stands," or to alter the constitution, "unless by request of two-thirds of the whole society," a revision of the confession and amendment of the constition, initiated in a general conference of its own motion, and thereafter carried by a two-thirds vote of those voting, but not of the whole membership, are revolutionary and void.—BEAR v. HEASLEY, Mich., 57 N. W. Rep. 270.

188. RELIGIOUS SOCIETIES— Mandamus.—A minister who has actual notice of the time and place of his trial before a proper committee, on charges affecting his right to continue in the ministry, and who is present at the trial and participates therein, is not entitled to a *mandamus* to compel his reinstatement on the ground of irregularities in the notice.—DEMPSEY v. NORTH MICHIGAN CONFERENCE OF WESLEYAN METHODIST CONNECTION OF AMERICA, Mich., 57 N. W. Rep. 267.

189. REMOVAL OF CAUSES.—Plaintiff being a resident of the State and judicial district, defendant a non-resident corporation, obtained from the United State

Circuit Court a writ of *certiorari* to remove the cause from the State court on the ground of prejudice and local influence, filed a certified copy of its petition and affidavit in the State court, and there moved for an order adjudging that the court would proceed no further in the cause, and that the clerk should certify the record to the United States Circuit Court. The judge declined to sign the order or permit the removal: Held that, the record showing on its face good ground for removal, defendant's procedure was correct, and the court should have granted an order for removal.—BAIRD V. RICHMOND & D. R. Co., N. Car., 18 S. E. Rep. 698.

190. RES JUDICATA.—A judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the property owner as to the amount of his loss, as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment.—AETNA INS. CO. V. CONFER, Penn., 28 Atl. Rep. 153.

191. RES JUDICATA—Appeal.—A question dicided by the Supreme Court on a former appeal becomes the law of the case in all its stages, and will not ordinarily be reversed upon a second appeal of the same case, when the facts are substantially the same.—ST. CROIX LUMBER CO. V. MITCHELL, S. Dak., 57 N. W. Rep. 236.

192. SALE—Goods Sold and Delivered.—In an action for goods sold, special findings that the goods were not as bargained for; that defendant paid by check a certain sum; that defendant was asserting part of the goods to be inferior in quality, and disputing his liability for the rest of the contract price; that the check sent was not accepted by plaintiff in full payment,—are not inconsistent with a general verdict for plaintiff.—POTTLITZER V. WESSON, Ind., 35 N. E. Rep. 1030.

193. SALE — Rescission by Seller.—An assignee for benefit of creditors takes no better title than his assignor had, and in detinue by the seller to recover goods as fraudulently bought by the assignor it is immaterial whether the assignment is invalid or in fraud of the assignor's creditors.—COHN V. STRINGFELLOW, Ala., 14 South. Rep. 286.

194. SALE — Right of Seller to Rescind.—Where the buyer is insolvent when he contracts for goods, and, about the time of delivery executes a judgment note and a bill of sale to a creditor, which practically closes up his business, the seller is entitled to rescind the sale.—BUGHMAN V. CENTRAL PARK, Penn., 28 Atl. Rep. 209.

195. TAXATION.—Agricultural machinery manufactured in another State, but brought into and stored in this State in a warehouse, for the convenient distribution thereof in supplying customers and filling orders, is subject to taxation as other personal property.—STATE V. WILLIAM DEERING & CO., Minn., 57 N. W. Rep. 313.

196. TAXATION—Foreign Insurance Companies.—Under section 2,745, Rev. St. as amended April 19, 1893, a regular mutual life insurance company, incorporated under the laws of another State and doing business in this State, and having filed its sworn statement in the office of the superintendent of insurance within 60 days after January 1, 1893, as required by sections 3606 and 3608, is required to pay to the superintendent of insurance in the month of December, 1893, such sum as, added to the amounts paid to the different county treasurers, will produce an amount equal to 2 1-2 per cent. of the gross premium and assessment receipts of such company, for the year 1892, as shown by such statement filed in the department of insurance.—STATE V. HAHN, Ohio, 35 N. E. Rep. 1052.

197. TAXATION—Realty or Personalty.—The pipes of a water company extending from its pumping machinery to a lake, and not shown to be laid on land not owned or controlled by it, are real property, within 3 How. St. § 1,170*a*, which provides that "real property shall include all lands and buildings and fixtures thereon and appurtenances thereto."—MONROE WATER CO. V. TOWNSHIP OF FRENCHTOWN, Mich., 57 N. W. Rep. 268.

198. TAX SALE—Redemption.—All matters relating to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force.—POUNDS V. RODGERS, Kan., 35 Pac. Rep. 223.

199. TAX SALE—Redemption of Land.—In an action to recover land, defendant, under a general denial, may introduce all defenses he has, and plaintiff may, without a reply, prove any matter in avoidance of such defenses; and consequently it is not error to sustain a demurrer to a good special reply when a general denial has also been pleaded to the answer.—JACKSON V. NEAL, Ind., 35 N. E. Rep. 1021.

200. TAX TITLE—Recovery of Tax.—Plaintiff purchased land at a tax sale in 1883, obtained his tax deed in 1889, and brought action to quiet title thereunder. Defendant, who had purchased the land at a foreclosure sale, filed a cross complaint to quiet his title. Plaintiff's tax deed proved invalid, and defendant's title to the land was quieted: Held, that Rev. St. 1881, § 6466, which provides that, unless the purchaser at a tax sale take a deed within 2½ years, no interest can be recovered thereafter from the redemptioner, does not apply, as there was no attempt to redeem; and that plaintiff was entitled, under section 6497, to a lien on the land for the amount of taxes and costs, with interest for the full time.—STALCUP V. DIXON, Ind., 35 N. E. Rep. 987.

201. TRESPASS—Surface Water—Obstructing Flow.—To dump earth on a street cut in a hillside, so as to stop the flow of surface water in a natural channel along said street, thus soaking and loosening the ground so as to force back a supporting wall and house foundation on the lower side, is an actionable trespass.—LUCOT V. RODGERS, Pa., 28 Atl. Rep. 242.

202. TRESPASS TO TRY TITLE — Though a county court has exceeded its jurisdiction in appointing commissioners to sell land of a deceased person, said commissioners being the heirs of deceased, there deed conveys all their interest to the purchaser, and is sufficient to support his action of trespass to try title against a mere trespasser.—BERGER V. ARNOLD, Tex., 24 S. W. Rep. 527.

203. TRIAL—Cross-Examination of Witness.—A party, in cross-examining a witness, cannot go beyond the subject-matter of his examination in chief, except to show his bias or prejudice, or to lay the foundation for discrediting his evidence, by showing that he had made prior contradictory statements. Within these limits, the law permits the examination of the witness as to every fact touching the matter to which he testified on his examination in chief, so that his temper, leanings, relation to the parties and the cause, his intelligence, accuracy of his memory, his disposition to tell the truth, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully interrogated.—WENDT V. CHICAGO, ST. P. M. & O. RY. CO., S. Dak., 57 N. W. Rep. 226.

204. TRIAL—Instructions—Harmless Error.—Where a jury are correctly instructed by the trial court upon all the law questions involved in the case, and the court, in addition, gives a slightly contradictory instruction, which clearly appears from the special findings of the jury, not to have misled them, such additional instruction will not under the circumstances entitle the defeated party to a new trial.—BIGELOW V. WYGAL, Kan., 35 Pac. Rep. 200.

205. TRIAL — Witness—Contradicting.—Rev. St. § 860, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding," shall be given in evidence, or in any manner used against him, does not apply to an application, under section 878, by one indicted, to have witnesses summoned and paid by the United States, and statements therein are competent to contradict his testimony.—TUCKER V. UNITED STATES, U. S. S. C., 14 S. C. Rep. 299.

206. TRUSTS — Evidence.—In an action to establish a trust in land the title to which is in defendant, the burden of proof, is on plaintiff, and only facts strong, convincing, and unequivocal can overthrow the deed. —SUMMERS v. MOORE, N. Car., 18 S. E. Rep. 712.

207. TRUSTS—Perpetuities.—An agreement by brothers and sisters to hold land for their joint use, the share of each dying to vest in the survivors, and, on the death of the last, the whole to go to the son of one brother, does not raise a perpetuity, since the survivors, with such son, could convey a perfect title at any time.—MURPHY v. WHITNEY, N. Y., 35 N. E. Rep. 930.

208. USURY.—When a "*bonus*" is exacted by the lender as a consideration for making a loan, it is, in computing, for the purpose of determining whether the loan is usurious, to be deducted as of the date when it is payable. If payable at the time of the loan, it is to be deducted from the principal as of the date of the loan, and the remainder, or what the borrower receives and retains, is to be taken as the basis for computation.—SMITH v. PARSONS, Minn., 57 N. W. Rep. 311.

209. VENDOR'S LIEN — Foreclosure.—Though a subvendee, his heirs and representatives, need not be made parties to a suit to foreclose a vendor's lien, his heirs may recover the land from a purchaser at the foreclosure sale, who has notice of their rights, on refunding the price paid by paid purchaser, with interest.—ROBINSON v. KAMPMANN, Tex., 24 S. W. Rep. 529.

210. VENDOR'S LIEN—Release.—A vendor who has reserved a lien on an entire tract, agreeing to release therefrom such portions as might be sold by the vendees, on their turning over to him the cash and notes secured by a subvendor's lien received by them on such sales, is not bound to release any portion on the payment by the vendees of one of their own purchase money notes, without having sold any portion of the land.—WERSTER v. LAND, MORTGAGE, INVESTMENT & AGENCY CO. OF AMERICA, Tex., 24 S. W. Rep. 570.

211. WAREHOUSEMEN — Insuring Good. — Plaintiffs, whose goods were burned, uninsured, in defendant's warehouse, testified that defendant's office man asked her if she wanted the goods insured; that she asked him to have it done, and so agreed: Held, that such evidence went to show a usage by defendant to effect insurance on its customers' goods on request, as an incident of the bailment, and plaintiff need not prove a specific parol contract to insure.—TOWER v. GROCERS' SUPPLY & STORAGE CO. OF PITTSBURGH, Penn., 28 Atl. Rep. 229.

212. WATER RIGHTS — Construction of Grant. — The grant of the water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument conveying the grant. — MILLER v. SHENANDOAH PULP CO., W. Va., 18 S. E. Rep. 740.

213. WILLS — Bequests. — A will gave a town certain property as a fund with power to sell; the proceeds, together with the rents and profits, to be kept as a perpetual fund, "guarantied" by the town, with 6 per cent. interest, for certain purposes, including the establishment and continuance of an institute to be located on certain land. Failure to comply with the words and intent of the will was a ground of forfeiture: Held, that no contract of guaranty was required; that a particular amount of interest was not to be guaranteed; and that the term was used in the popular sense that the fund was to be kept good, and applied as directed. — CITY OF QUINCY v. ATTORNEY GENERAL, Mass., 35 N. E. Rep. 1066.

214. WILLS—Bequest to Strangers.—A bequest of all debts and demands held by testatrix against the executor and his wife does not include a bond and mortgage given by them, and owned by testatrix at her death, where she held other debts against them; knew that a purchaser of the mortgaged premises had retained a sufficient amount of the purchase money to pay the mortgage; the mortgage constituted nearly one-fourth of her estate, which was small; her sole heir and principal devisee was a son 10 years old; and such executor and his wife were strangers.—IN RE DWIGHT'S ESTATE, N. Y., 35 N. E. Rep. 936.

215. WILLS—Devise of Life Estate.—A will of personal and real property provided: "To my beloved wife I will allow the use, as she may deem best, the residue of my estate, for her own advantage, and at her death, if any of it remain, to be equally divided between my three children," named; also, "if it be necessary, to pay my debts, that my real estate will need to be sold, that that is devised to A [the daughter] shall be reserved for her:" Held, that the widow had only a life estate in the land, with no power to sell or dispose of it.—TAYLOR v. BELL, Penn., 28 Atl. Rep. 208.

216. WILL—Distribution.—Under a will directing distribution "share and share alike," to a sister, one share; to a stepdaughter, one share; and to "each" nephew and niece then living, one share, — each niece and nephew take an equal share with the sister and stepdaughter.—IN RE PENNY'S ESTATE, Penn., 28 Atl. Rep. 255.

217. WILL — Equitable Conversion.—A will directing the sale of land only in case of necessity for the payment of debts does not constitute an equitable conversion of the land, so as to defeat partition. — SILL v. BLANEY, Penn., 28 Atl. Rep. 251.

218. WILLS—Life Estate.—Testator bequeathed to his wife all his property, to hold "absolutely in her own right for and during her lifetime, with power to dispose of the same at her own pleasure; but, in the event of her remarrying, then one-half of all the aforesaid property shall revert to my children," and, at the death of his wife, then all the property "shall be divided among my children, share and share alike:" Held, that the wife took a life estate, and that the power of disposition did not enlarge it to a fee.—KENNEDY v. MCKENNEDY, Penn., 28 Atl. Rep. 241.

219. WILLS—Life Legacies.—Testator bequeathed all the residue of his estate to his wife, "to be used and enjoyed by her during the term of her natural life, or as long as she may remain my widow," thereafter to be equally divided between others named: Held, that the widow, a non resident of the State, was entitled to the *corpus* of the residue, consisting of money, only on filing a sufficient bond for its forthcoming on her death or remarriage.—IN RE MCDOUGALL, N. Y., 35 N. E. Rep. 961.

220. WILLS—Nature of Estate.—A devise of land to the daughter of testator in trust for her separate use during life or maidenhood, with an executory devise over to her brothers and sisters, should she die without issue, vests a fee-simple in the daughter upon her marrying and having issue.—KELLY v. WILLIAMS, N. Car., 18 S. E. Rep. 693.

221. WILLS — Perpetuities.—Testator gave his property to trustees, to divide his income among his daughter and his two cousins during their lives, and provided that if the cousins should die before the daughter the property should go to the daughter, but if the daughter should die before the cousins the property should go to such person as the daughter should name by will: Held, that the will was not void as suspending the absolute ownership, or the absolute power of alienation, of the property, for more than two lives in being.—BIRD v. PICKFORD, N. Y., 35 N. E. Rep. 988.

222. WILLS — Residuary Bequests.—Testator, after having declared an intention to dispose of his whole estate, and given specific bequests and devises, provided: "I give and bequeath to my brother A any and all of my household goods, books, clothing, furniture, etc., that he may desire; the balance of the personal effects to be divided among the children of my sister M:" Held, that the residuary bequest to the children of M carried a balance of testator's personal estate consisting of money and securities, and as to which he would otherwise have died intestate.—IN RE REIMERS ESTATE, Penn., 28 Atl. Rep. 186.